FAIRVIEW SCHOOLS BHD

v.

INDRANI RAJARATNAM & ORS

COURT OF APPEAL, KUALA LUMPUR
MAHADEV SHANKAR JCA
MOKHTAR SIDIN JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-763 OF 1996]
15 NOVEMBER 1997

CIVIL PROCEDURE: *Appeal - Parties - Persons not parties to action in lower court - Whether could intervene - Whether leave required - Whether Rules of High Court 1980 applicable - Whether appeal could be moved by directors of company*

CIVIL PROCEDURE: *Costs - Security for costs - Whether deposit for costs of appeal required - Whether at discretion of court - Whether trial judge correct to order cost of petition for winding-up to be borne by persons not party to action*

COMPANY LAW: *Winding-up - Locus standi - Names not included in list of persons intending to appear in High Court - Companies (Winding-up) Rules 1972 do not provide for intervention - Whether could intervene - Whether opposing creditors & contributories had right of appeal - Whether permitted to be heard as amicus curiae - Whether creditors in support of winding-up but not on record could be heard*

COMPANY LAW: *Winding-up - Petition - Whether company could appeal against winding-up - Whether absence of stay of winding-up could affect appeal - Whether appellant a domestic company - Whether appellant trustee of permit and assets for founder members - Whether trial judge correct in ordering company to be wound up under s. 218(1)(f) & (i) of Companies Act 1965*

Fairview Schools Bhd ('FSB') was originally named Fairview Schools Association ('FSA'), and it was set up as an alternative international school by the parent-teacher association of the Garden School. The pro-tem committee consisted of Ahmad Roose, PS Sundram ('Sundram') and Dr IU Malik (hereinafter referred to collectively as 'the G3'). The Ministry of Education approved the setting up of the school and directed the Registrar of Schools to issue temporary certificates to the then pro-tem chairman, Ahmad Roose. It was not disputed that the G3 were among the first persons who influenced

the gestation of FSB and propelled it to a viable educational institution. The school was temporarily housed in rented premises and there were plans to build their own school building on a piece of land that was purchased during the chairmanship of one KB Thuraisingham ('KBT'). It was, however, decided by a subsequent committee that the said land was unsuitable and it was sold off at a loss, and an agreement was entered into for the purchase of another, larger piece of land. Several extraordinary general meetings ('EGM') were called to discuss the problems faced by FSB in raising the necessary money to purchase the land. At the EGM of 11 November 1992, which was called to raise the school fees by 30%, a vote of no confidence was passed, resulting in the resignation of the chairman and several board members. The meeting nevertheless was carried on with a new chairman. Thereafter, another EGM was called to elect a new board and it was that board that caused to be passed new resolutions to raise the necessary money to make FSB financially viable again. Dissatisfied with the manner in which the directors were elected, and alleging that the EGMs were illegal, the petitioners pursuant to s. 218(1)(e), (f) & (i) of the Companies Act 1965 ('the Act') filed a winding-up petition against FSB. The petitioners claimed that the permits issued by the Government to run the school belonged to the G3 and that FSB was merely a trustee of all its assets for the G3. It was held in the lower court that: (i) FSB was a domestic company and the shareholders had no right to its assets but only in overseeing and managing the school; (ii) FSB was the trustee of the permit and the assets of the company for the G3; (iii) the purchase value of the shares in FSB was refundable; (iv) the company was to be wound-up under s. 218(1)(f) & (i) of the Act; and (v) the petitioners were to file an action against the directors of the new board for the recovery of the costs of the petition. The company appealed.

In the meanwhile, a civil suit was brought by Sundram against FSB for wrongful dismissal as managing director of FSB, and a third proceeding was filed by the G3 for mandamus to restore Ahmad Roose as the permit holder. Those two proceedings were put on hold pending the outcome of the appeal by the company.

A motion on behalf of two contributories was filed for leave to intervene in the appeal. Their names were not included in the list of persons intending to appear in the High Court. There was a notice of intention to appear on petition filed in the High Court on behalf of 98 creditors and 57 contributories who opposed the petition as did the company. The petitioners had, in response to the appeal, filed a motion to strike it out on the grounds that the persons who brought it had no *locus standi* and that there was nothing in the Companies (Winding-up) Rules 1972, ('the Winding-up Rules') permitting intervention.

In addition, they submitted that the Rules of the High Court 1980 ('the RHC') were irrelevant. The petitioners further submitted that security for costs of the appeal should be paid into court by the company's directors. At the hearing of the appeal the motions were heard first.

Judgment 1

Held:
Per Mahadev Shankar JCA

[1] Order 88 r. 5 of the RHC does not refer to applications to wind up under s. 218 of the Act. Therefore the initiation of such petitions, their form, service, advertisement and mode of involvement of interested persons must of necessity be governed by the special provisions contained in the Winding-up Rules.

[1a] The petition was filed under s. 218 of the Act in the court below and a liberal interpretation should be given to s. 253(2) of the Act. Where the Winding-up Rules make a specific provision for a particular matter, it would exclude a parallel provision in the rules of the court, but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provisions exist. If not, it can always resort to O. 92 r. 4 of the RHC. The powers of the court on hearing a petition provided by s. 221 of the Act are exercised in conformity with the RHC and the appeal is a rehearing.

[2] It is well settled that a person who is a party to an action can appeal without leave. A person who is not a party is bound by the order, and whether he is aggrieved by it or is prejudicially affected by it, he cannot appeal without leave. However, if a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave, he will get it.

[2a] The opposing contributories and creditors who appeared in the court below had an independent right of appeal but the interveners were not persons who had appeared in the court below and they therefore had no right of appeal without leave. Such leave was required because they were parties who had allowed the judgment to be made against their interest by default of appearance. Willful failure to participate in the proceedings and the acquiescence to the order would provide grounds for refusal of leave. The interveners did not explain why they had not appeared in the court below. In the result, the application by the interveners to intervene had to be dismissed with costs.

[3] The wishes of the opposing contributories and creditors of a winding-up petition who appear in the court below have to be taken into account if relevant, notwithstanding the use of the word "may" in s. 289 of the Act. Those contributories and creditors have a right to be heard in the court of first instance. It is an exercise of discretion whether the court does or does not in fact make the winding-up order, because the use of the word "may" in s. 218(f) of the Act is permissive.

[3a] The 57 contributories and 98 creditors did not have a right to be heard in the appeal unless they had filed a notice of appeal. Otherwise, they might substantially add to the cost of the appeal without running any corresponding risk of compensating other parties who might be injuriously affected by the protraction of the proceedings. Nevertheless, as the court might reasonably hear other persons who had an interest in the company as *amicus curiae*, they would be allowed to be heard on the substantive appeal.

[3b] Creditors and contributories who wish to support a winding-up order stand in a different position from those who want it varied or set aside. They have a right to be heard in the appeal as 'respondents', provided they put themselves on record by invoking s. 44 of the Courts of Judicature Act 1964. Although Sundram who was a creditor had not done so, he was nevertheless allowed to be heard in the substantive appeal.

[4] The failure of the company to obtain a stay of the winding-up order under s. 243 of the Act did not limit the residual powers of the directors to prosecute an appeal. The absence of a stay does not affect the appellate process, and an appeal by itself does not amount to a stay of execution.

[5] All matters concerning costs are in the discretion of the court and how the discretion should be exercised will vary from case to case. After due consideration, the sum required by way of security for the costs of the appeal was set at RM30,000. There was no order made on the costs of the second motion of the petitioners, as the success of obtaining the security of costs was neutralised by the failure of the application to strike out.

Obiter dictum

[1] In a s. 218 petition, the service is by advertisement. Consequently, all creditors and contributories are parties who are deemed to be served and can participate in the proceedings. Whether or not they appear they will be bound by the winding-up order because s. 226(4) of the Act deems that a winding-up order is made on the joint petition of all creditors and contributories.

Judgment 2

Held:
Per Mahadev Shankar JCA

[1] The first object in the memorandum of any company has always been treated with the utmost reverence and as representing the primary or predominant purpose for which the company has been set up. Nowhere in the Memorandum and Articles of Association ('M&A') of FSB, was it stated that FSB's role was to act as a trustee or manager only, and that the beneficiary and owner of the assets of the school was the G3 or anyone else. The name of the company was not an alias or style under which the G3 was trading.

[2] Under a M&A, all shareholders have equality of rights and votes. It is trite law that the M&A represents the contract *inter se* between all members of the company. There was nowhere in the M&A of FSB any provision for founder shares for the G3 or any hint that ownership or control of FSB's assets should be retained by the G3. There was also nowhere in the accounts of FSB any suggestion that the G3 had injected any tangible assets into the company, nor was there anything to suggest that there was any liability whatsoever on the part of FSB as trustee to the G3 for any assets.

[3] Limited companies are formed so that its shareholders are not exposed to unlimited liability for the company's debts. In exchange for this immunity, share capital is pumped into the company which becomes available to the company's creditors. If the G3 thought that the assets of FSB belonged to them and that the parent-shareholders had no rights at all, there would have been no need to hold company meetings to obtain their sanction to deal with the assets in the company's books.

[4] The first application to the Ministry was not made by the G3 in its individual capacity but as agent for the entire group of individuals who constituted the parent-teacher association of the Garden School. The G3 was not a power unto itself but only a pro-tem committee on behalf of

all the individuals who lent their support to the idea of forming the new company.

[5] Share capital cannot be refunded by the company to a shareholder for shares returned. This is illegal. The only way to achieve this is for the company to go through a restructuring exercise for reduction of capital. The lower court's finding that the purchase value of the share was a refundable deposit was a misdirection in law and fact. What was refundable was the deposit made as security for fees which went into a separate account.

[6] A provisional certificate of registration is not a document of title evidencing presumptive ownership of property, be it land or chattels real or personal. It merely records the fact that official recognition has been given of the place where the designated activity is to be conducted and identifies the person, that is the chairman, primarily responsible for ensuring that the designated activities are carried out in the manner prescribed by the provisions of the required Act. On the facts of the instant case, it was a misconception to talk about ownership of the permits as they were not issued to any individual in his personal capacity but initially to the applicant that was FSA. The names inserted in the permits were not inserted to show ownership but to indicate the identity of the person who by virtue of his office as chairman was charged with the responsibility of carrying out the requirements of the Education Act 1961.

[7] Articles 26 to 38 of the M&A of FSB placed no restriction on the transfer of shares. Article 30 provided that the directors could in their discretion refuse to register any transfer without assigning any reason. FSB was a public company and such restrictions would be regarded very jealously by the courts. Whatever was discussed at the first meeting of the company was superceded by the M&A of FSB.

[8] FSB's only assets came from the money put into the company by its shareholders as capital and by the parents as fees and refundable deposits. The G3 were the prime movers of the schools and as the pro-tem committee, they took steps with the help of legal advisors and the authorities to incorporate it. They were in effect, the chief promoters of FSB. Promoters have a legal duty not to make any secret profits out of the promotion of the company without the company's consent and they have also to disclose to the company any interest they have in any transaction proposed to be entered into by the company. Promoters are trustees of all assets and rights they acquire for the company in the

course of formation. Everything that is put into a company's name upon incorporation, belongs to the company and to the company alone, in the absence of reservations in the clearest terms in the M&A or in a formal contract, executed after incorporation with full knowledge and consent of all the shareholders. The finding by the lower court, that FSB was a trustee for the founder members, could not stand scrutiny.

[9] The reliance on *Re Vandervell's Trusts* was totally misplaced. Had FSB been an agent or trustee for the G3, FSB would have had no contractual rights to sue or to be sued on those contracts made with PGK Sdn Bhd and Bitaria, by virtue of s. 183 of the Contracts Act 1950.

[10] The petition was a contributors' petition. As against the six petitioners there were 57 shareholders and 98 creditors who were opposed to the petition. They did not want the company wound-up. It was a serious misdirection to disregard their views totally under that ground, or under the just and equitable ground. It should have been noted that the resolutions that were passed were special resolutions and they required the support of at least 75% of the shareholders present and voting. Thus, the petitioners' case under s. 218(1)(f) of the Act was a non-starter.

[11] There was no express or implied partnership between the G3 and the other parent-shareholders before incorporation or afterwards. All FSB resolutions were passed with the majority of votes prescribed by the M&A of FSB and the Act. There was therefore no analogy between the instant case and the two quasi partnership decisions that were relied on by the lower court. The court could not, in pursuit of what it considered fair, ignore the agreements between the parties. These agreements were reflected in the documents and in the M&A of FSB.

[12] Matters which are not pleaded cannot be made good by affidavit evidence. The complaints made by the petitioners in their affidavits were not pleaded in the petition and they should not have been dealt with by the court. In dealing with them, the court could easily be misled into treating bare allegations as constituting evidence.

[12a] The complaints of the petitioners were not made in the prescribed manner at the meetings. If an adjournment was required it was up to the petitioners to make a formal proposal so that a vote could be taken and if carried the meeting would have had to be adjourned. By art 70 of the M&A, the chairman could only adjourn the meeting with the consent of the meeting and had to do so if directed by the meeting and it did not lie in the mouth of the court to say that the meeting should have been adjourned because the court thought it was a fair thing to do.

[12b] By art 97(2) of the M&A, FSB could appoint any person to be a director either to fill a casual vacancy or as an additional director. If the shareholders wished to propose more directors, they could requisition a meeting as was provided by art 58 of the M&A and s. 144 of the Act.

[13] Section 149(1)(b) of the Act must be complied with. If on previous occasions the shareholders broke the law out of ignorance, that did not mean that they could continue to do so with impunity. An illegal practice cannot become legal just by usage.

[14] Section 123(4) of the Act provides for members wishing to be elected office bearers to lodge statutory declarations with the Registrar of Companies and the Official Receiver, before they are appointed. The Act also provides for penalties in the case of non-compliance. It was not right for the lower court to hold that it was just and equitable to penalise FSB for doing what it was required by law to do.

[15] A contributor's petition is a class action and must be brought on behalf of all the shareholders. The six petitioners were fighting the rest of the shareholders so that the company's assets could be taken away and effectively given to the G3, two of whom were not shareholders. The petitioners had lent their assistance in filing the petition for an improper purpose and on that ground the petition should be dismissed.

[15a] Where outsiders are claiming that property registered in the name of a limited company is theirs, the proper route is to file a civil suit in detinue or conversion or even for a declaration that the property is being held by the company in trust for the claimants. To utilise a few minority shareholders, as was done in the case before the court and to destroy the corporate edifice through a winding-up petition, was a misuse of the court's process.

[15b] Where two groups of shareholders are at war with each other on matters of company policy, the proper way to resolve such disputes is by the democratic process of the majority vote. In the instant case, the M&A of FSB contained inherent safeguards to achieve this, as does the Act. Thus, if the majority of the shareholders of FSB did not like what had happened at the meetings, they could have requisitioned a new meeting and voted the new board out.

[16] The objection on the ground of multiplicity was well taken and the lower court should have ruled in favour of FSB. There were ramifications which arose out of the issue of multiplicity, because the ownership of the permits, the ownership of the assets of FSB, and the alleged illegality

of the last four shareholders' meetings were all common questions of law and fact in the present action and in the other two proceedings. The contest was between the G3 on one side and FSB and the education authorities on the other. To the extent that the G3 had fully embroiled themselves of the proceedings before the court, it had to be held that the issue of estoppel would apply to each of them on all matters which had been decided in this appeal.

[17] The petition was filed under s. 218 of the Act. It was not a petition for relief from oppression under s. 181 of the Act. The only final order under s. 221 of the Act was to direct a winding-up or to dismiss the petition. The power to deal with the assets of the company was vested in the liquidator and not in the court. The court's attempt to preserve the assets and the school as a going concern so that it could be handed over to the G3 was completely misconceived.

[18] Courts should not make orders against persons who are not parties to the proceedings and who have not been heard why such orders should be made against them. In the present case, if the cost of the petition was to be paid by the directors of the new board and if the order had any validity it was not understood why a fresh action had to be filed to recover it.

[19] All orders appealed against were set aside, and the appellant's deposit by way of security for costs was to be refunded. The petitioners would have to pay for costs in the court below and in the appellate court to the appellant. The petitioners and Sundram would have to pay the taxed costs of the Official Receiver and the taxed costs of the contributors and creditors who opposed the petition in the lower court. There would not be any order for costs for the contributories and creditors as they were there only as *amicus curiae*.

[Appeal allowed; orders of High Court set aside.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Fairview School Berhad ('FSB') telah pada asalnya dinamakan Fairview School Association ('FSA'), dan ianya telah ditubuhkan sebagai sebuah sekolah antarabangsa alternatif oleh persatuan ibubapa-guru Garden School. Jawatankuasa pro-tem terdiri daripada Ahmad Roose, PS Sundram ('Sundram') dan Dr. IU Malik (selepas ini dirujuk sebagai 'G3 tersebut') Kementerian Pendidikan telah meluluskan penubuhan sekolah-sekolah tersebut dan telah mengarahkan supaya pendaftar sekolah-sekolah mengeluarkan perakuan-perakuan sementara kepada pengerusi pro-tem ketika itu, Ahmad Roose. Adalah

tidak dipertikaikan bahawa G3 tersebut merupakan antara orang-orang pertama yang telah mempengaruhi kelahiran FSB, dan yang telah menerajui Fairview Schools menjadi sebuah institusi pembelajaran yang giat. Sekolah itu buat sementaranya terletak dalam premis-premis yang disewa dan terdapatnya perancangan untuk membina bangunan sekolah mereka sendiri di atas sebuah tanah yang telah dibeli ketika dalam tempoh dipengerusikan oleh seorang yang bernama KB Thuraisingham ('KBT'). Ianya walaubagaimanapun telah diputuskan jawatankuasa yang kemudiannya bahawa tanah tersebut adalah tidak sesuai dan ianya telah dijual dengan harga yang merugikan, dan satu perjanjian telah dimasuki bagi pembelian sebuah tanah yang lain, yang lebih besar. Beberapa Mesyuarat Agong Luar Biasa ('EGM') telah diadakan untuk membincangkan masalah kewangan yang dihadapi oleh FSB untuk mengumpul wang yang diperlukan bagi membeli tanah tersebut. Pada 11 November 1992 yang mana satu EGM telah diadakan yang bertujuan untuk membincangkan kenaikan yuran sekolah sebanyak 30%, satu undi tiada keyakinan telah diluluskan,yang mana telah menyebabkan perletakan jawatan Pengerusi dan beberapa orang ahli lembaga. Mesyuarat itu namun begitu telah diteruskan dengan seorang Pengerusi yang baru. Selepas itu, satu lagi EGM telah diadakan bagi melantik Lembaga yang baru dan Lembaga baru inilah yang telah menyebabkan kelulusan resolusi-resolusi baru untuk mengumpulkan wang yang diperlukan bagi menjadikan FSB giat di sisi kewangan sekali lagi. Berasa tidak puashati dengan cara dalam mana Pengarah-Pengarah telah dilantik, dan mendakwa bahawa ianya tak sah, pempetisyen-pempetisyen selaras dengan s. 218(1)(e)(f) & (I) Akta Syarikat 1965 ('Akta tersebut') telah memfailkan petisyen penggulungan terhadap FSB. Pempetisyen-pempetisyen menuntut bahawa permit-permit yang telah dikeluarkan oleh Kerajaan untuk mengendalikan sekolah-sekolah kepunyaan G3 dan bahawa FSB adalah semata-mata merupakan pemegang amanah kesemua aset-asetnya untuk G3. Adalah diputuskan dalam mahkamah rendah bahawa (i) FSB merupakan sebuah syarikat domestik dan pemegang-pemegang sahamnya tidak berhak kepada aset-asetnya tetapi hanya menyelia dan menguruskan sekolah-sekolah tersebut; (ii) FSB merupakan pemegang amanah bagi permit dan aset-aset syarikat untuk G3; (iii) nilai belian saham-saham dalam FSB boleh dibayar-balik; (iv) syarikat tersebut hendaklah digulung di bawah s. 218(1)(f) & (i) Akta tersebut; dan (v) pempetisyen-pempetisyen hendaklah memfailkan satu tindakan terhadap pengarah-pengarah dalam Lembaga baru untuk mendapatkan semula kos petisyen tersebut. Syarikat telah merayu.

Guaman sivil tersebut telah dimulakan oleh Sundram terhadap FSB bagi pemecatan secara salah sebagai Pengarah Urusan FSB, dan prosiding yang ketiga telah difailkan oleh G3 untuk mandamus dan untuk mengembalikan Ahmad Roose sebagai pemegang permit. Kedua-dua prosiding itu telah ditangguhkan sementara menantukan keputusan rayuan oleh syarikat tersebut.

Satu usul bagi pihak dua penyumbang telah difailkan, bagi mendapatkan kebenaran untuk mencelah dalam rayuan tersebut. Nama-nama mereka telah tidak dimasukkan dalam senarai orang-orang yang berniat untuk hadir di Mahkamah Tinggi. Terdapat notis niat untuk hadir pada petisyen yang telah difailkan dalam Mahkamah tinggi bagi pihak 98 pemiutang dan 57 penyumbang yang telah membantah petisyen itu sepertimana yang dilakukan oleh syarikat tersebut. Pempetisyen-pempetisyen telah bagi menjawab rayuan tersebut memfailkan satu usul untuk membatalkannya atas alasan bahawa orang-orang yang telah memulakannya tidak mempunyai *locus standi* dan tidak terdapat apa-apa dalam Kaedah-Kaedah Syarikat (Penggulungan) 1972, ('Kaedah-Kaedah Penggulungan tersebut') yang membenarkan pencelahan. Tambahan pula, mereka telah mengemukakan bahawa Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah tak relevan. Pempetisyen-pempetisyen selanjutnya berhujah bahawa jaminan bagi kos rayuan tersebut seharusnya dibayar ke dalam Mahkamah oleh Pengarah-Pengarah syarikat. Di perbicaraan rayuan tersebut, usul-usul telah didengar pada mulanya.

Penghakiman 1
Diputuskan:
Oleh Mahadev Shankar HMR

[1] Aturan 88 k. 5 KMT tidak merujuk kepada permohonan-permohonan untuk menggulung di bawah s. 218 Akta tersebut. Dengan itu permulaan petisyen-petisyen yang sedemikian, borangnya, penyampaian, pengiklanan cara penglibatan orang-orang yang berminat semestinya dikuasai oleh peruntukan-peruntukan khas yang terkandung dalam kaedah-kaedah penggulungan.

[1a] Petisyen tersebut telah difailkan di bawah s. 218 Akta tersebut dalam mahkamah di bawah dan satu pentafsiran yang liberal seharusnya diberikan kepada s. 253(2) Akta tersebut. Di mana kaedah-kaedah penggulungan membuat peruntukan yang khusus bagi sesuatu perkara yang tertentu, ianya akan tidak memasukkan peruntukan selari dalam kaedah-kaedah mahkamah, tetapi di mana kaedah-kaedah penggulungan tidak menyebut mengenai perkara yang sedang menanti keputusan di hadapan mahkamah, mahkamah haruslah memakai prosedurnya yang tersendiri di mana peruntukan nyata wujud. Jika tidak, ianya boleh berpaling kepada A. 92 k. 4 KMT. Kuasa-kuasa mahkamah ketika mendengar sesuatu petisyen yang diperuntukkan oleh s. 221 Akta tersebut dilaksanakan bersesuaian dengan KMT dan rayuan itu merupakan satu perbicaraan semula.

[2] Adalah amat diketahui bahawa seseorang yang merupakan suatu pihak kepada satu tindakan boleh merayu tanpa kebenaran. Seseorang yang bukan merupakan satu pihak terikat oleh aturan, dan samada ianya

terkilan oleh aturan itu atau terjejas olehnya dengan cara yang memudaratkan, beliau tidak boleh merayu tanpa kebenaran. Walaubagaimanapun, jika seseorang mendakwa dirinya terkilan oleh sesuatu aturan, ianya boleh membentuk satu kes *prima facie* mengapa beliau seharusnya mendapat kebenaran, beliau pasti akan mendapat kebenaran itu.

[2a] Penyumbang-penyumbang dan pemiutang-pemiutang menentang yang hadir dalam mahkamah di bawah mempunyai hak rayuan bebas tetapi pencelah-pencelah itu bukannya orang-orang yang telah hadir dalam mahkamah di bawah dan mereka oleh yang demikian tidak mempunyai hak rayuan tanpa kebenaran. Kebenaran yang sedemikian diperlukan kerana mereka merupakan pihak-pihak yang telah membenarkan penghakiman tersebut dibuat terhadap kepentingan mereka melalui kemungkiran kehadiran. Kegagalan untuk menyertai dengan sengajanya dalam prosiding tersebut dan menyetujui aturan akan memberikan alasan bagi keengganan untuk memberikan kebenaran. Pencelah-pencelah tidak menjelaskan mengapa mereka tidak hadir dalam mahkamah di bawah. Akibatnya, permohonan oleh pencelah-pencelah untuk mencelah haruslah ditolak dengan kos.

[3] Keinginan pihak menentang iaitu penyumbang-penyumbang dan pemiutang-pemiutang petisyen penggulungan yang telah hadir dalam mahkamah di bawah haruslah diambilkira jika relevan, meskipun terdapatnya penggunaan perkataan "mungkin" dalam s. 289 Akta tersebut. Penyumbang-penyumbang dan pemiutang-pemiutang itu mempunyai hak untuk didengar dalam mahkamah awal. Ianya merupakan perlaksanaan budibicara samada mahkamah tersebut telah pada hakikatnya membuat atau tidak membuat perintah penggulungan itu, kerana penggunaan perkataan "mungkin" dalam s. 218(f) Akta tersebut bermakna "permissive".

[3a] 57 penyumbang dan 98 pemiutang tersebut tidak mendapat hak untuk didengar dalam rayuan itu, melainkan mereka telah memfailkan satu notis rayuan. Jika tidak mereka mungkin akan menambah kepada kos rayuan secara substansialnya tanpa menghadapi risiko membayar pampasan kepada pihak-pihak lain yang mungkin akan terjejas dengan cara yang memudaratkan oleh prosiding yang berlarutan itu. Namun begitu oleh kerana mahkamah mungkin dengan wajarnya akan mendengar orang-orang lain yang mempunyai kepentingan dalam syarikat itu sebagai *amicus curiae,* mereka akan dibenarkan untuk didengar atas rayuan yang substantif.

[3b] Pemiutang-pemiutang dan penyumbang-penyumbang yang ingin menyokong perintah penggulungan itu berada dalam kedudukan yang berlainan daripada mereka yang mahukan agar ianya diubah atau diketepikan. Mereka mempunyai hak untuk didengar dalam rayuan sebagai "responden-responden", kecuali mereka memasukkan diri mereka dengan menyebut s. 44 Akta Mahkamah Kehakiman 1964. Walaupun Sundram yang merupakan pemiutang, telah tidak melakukan sedemikian, beliau telah namun begitu dibenarkan untuk didengar dalam rayuan yang substantif itu.

[4] Kegagalan syarikat untuk mendapatkan penggantungan perintah penggulungan itu di bawah s. 243 Akta tersebut tidak menghadkan kuasa-kuasa bakian pengarah-pengarah itu untuk mendakwa sesuatu rayuan. Ketiadaan penggantungan tidak menjejaskan proses rayuan, dan sesuatu rayuan dengan sendirinya tidak membawa kepada suatu penggantungan pelaksanaan.

[5] Kesemua perkara berkaitan kos adalah dalam budibicara mahkamah dan bagaimana budibicara itu harus dilaksanakan akan berubah dari satu kes kepada kes yang lain. Selepas dipertimbangkan, jumlah yang dikehendaki melalui jaminan bagi kos rayuan telah ditetapkan pada RM30,000. Tiada perintah dibuat berhubung dengan kos usul kedua pempetisyen-pempetisyen, kerana kejayaan mendapatkan jaminan kos telah dineutralkan oleh kegagalan permohonan untuk pembatalan.

Obiter dictum

[1] Dalam petisyen s. 218, penyampaian adalah melalui pengiklanan. Akibatnya kesemua pemiutang dan penyumbang-penyumbang adalah pihak-pihak, yang dianggap telah disampaikan dan boleh menyertai dalam prosiding itu. Samada mereka boleh hadir atau pun tidak, mereka akan terikat oleh perintah penggulungan kerana s. 226(4) Akta tersebut menganggapkan bahawa perintah pengglungan dibuat atas petisyen bersama kesemua pemiutang-pemiutang dan penyumbang-penyumbang.

Penghakiman 2
Diputuskan:
Oleh Mahadev Shankar HMR

[1] Matlamat pertama dalam Memorandum mana-mana syarikat adalah selalunya diberi penghormatan sebagai mewakili tujuan utama bagi yang mana syarikat tersebut telah ditubuhkan. Tidak terdapat mana-mana dalam Memorandum dan Tataurusan Persatuan ('M&A tersebut') FSB, dinyatakan bahawa peranan FSB adalah bertindak sebagai pemegang amanah atau pengurus sahaja, dan bahawa benefisiari serta pemilik aset-

Aset sekolah tersebut adalah G3 ataupun mana-mana orang yang lain. Nama syarikat tersebut bukannya satu alias atau caragaya di bawah yang mana G3 berdagang.

[2] Di bawah M&A tersebut, kesemua pemegang-pemegang saham mempunyai hak dan pengundian yang sama. Ianya merupakan undang-undang trite bahawa M&A mewakili kontrak *inter se* antara kesemua ahli-ahli syarikat. Tidak terdapat mana-mana dalam M&A FSB apa-apa peruntukan bagi saham-saham asas untuk G3 atau mana-mana petanda bahawa keempunyaan atau kawalan aset-aset FSB seharusnya dikekalkan oleh G3. Tidak juga terdapat dalam akaun FSB apa-apa saranan bahawa G3 telah menyuntik aset-aset nyata ke dalam syarikat, mahupun terdapat apa-apa untuk menyarankan bahawa terdapatnya sebarang tanggungan di pihak FSB sebagai pemegang amanah kepada G3 bagi mana-mana aset-aset.

[3] Syarikat-syarikat berhad ditubuhkan supaya pemegang-pemegang sahamnya tidak terdedah kepada tanggungan yang tidak terhad bagi hutang-hutang syarikat. Sebagai balasan bagi kekebalan ini, modal saham dimasukkan ke dalam syarikat yang mana menjadi tersedia kepada pemiutang-pemiutang syarikat. Jika G3 memikirkan bahawa aset-aset FSB menjadi milik mereka dan bahawa pemegang pemegang saham induk tidak berhak sama sekali, maka tidak perlu diadakan mesyuarat-mesyuarat syarikat untuk mendapatkan persetujuan mereka untuk menguruskan aset-aset dalam buku-buku syarikat.

[4] Permohonan pertama yang dibuat kepada Kementerian telah tidak dibuat oleh G3 dalam kedudukan individu mereka tetapi sebagai ejen bagi keseluruhan kumpulan individu yang membentuk persatuan ibubapa-guru Garden School tersebut. G3 bukannya merupakan satu kuasa ke atas diri mereka sendiri tetapi hanya merupakan jawatankuasa pro-tem, bagi pihak kesemua individu yang memberikan sokongan mereka kepada idea untuk membentukkan syarikat baru itu.

[5] Modal saham tidak boleh dibayar balik oleh syarikat kepada pemegang saham bagi saham-saham yang dikembalikan. Ini adalah tak sah di sisi undang-undang. Satu-satunya cara bagi mencapainya adalah untuk syarikat itu menjalani satu proses pembentukan semula untuk pengurangan modal. Keputusan mahkamah rendah bahawa nilai belian saham merupakan deposit yang boleh dibayar balik adalah satu salah-arahan di sisi undang-undang dan fakta. Apa yang boleh dibayar balik adalah deposit yang dibuat sebagai jaminan untuk yuran-yuran yang mana telah dimasukkan ke dalam akaun yang berasingan.

[6] Perakuan pendaftaran sementara bukannya merupakan satu dokumen hakmilik yang membuktikan tanggapan keempunyaan harta, samada dalam bentuk tanah atau hartabenda nyata atau secara peribadi. Ianya hanya mencatatkan fakta bahawa pengiktirafan rasmi telah diberikan tempat di mana aktiviti yang ditentukan itu seharusnya dijalankan dan mengenalpasti orang yang harus melakukannya, ianya adalah pengerusi, yang secara utamanya bertanggungajwab bagi memastikan bahawa aktiviti-aktiviti yang telah ditetapkan itu dijalankan menurut cara yang ditetapkan oleh peruntukan-peruntukan Akta yang diperlukan itu. Berdasarkan fakta-fakta kes semasa ini, ianya adalah satu salah tafsiran untuk berbicara mengenai keempunyaan permit-permit kerana ianya telah tidak dikeluarkan kepada mana-mana individu dalam kedudukannya secara peribadi tetapi secara asalnya kepada pemohon yang merupakan FSA. Nama-nama yang dimansukkan dalam permit-permit itu telah tidak dimasukkan bagi menunjukkan keempunyaan tetapi untuk menunjukkan identiti orang yang menurut kedudukannya sebagai pengerusi telah diberi tanggungjawab mengendalikan kehendak-kehendak Akta Pendidikan 1961 tersebut.

[7] Perkara 26 hingga 39 M&A FSB tidak menghadkan pemindahan saham-saham. Perkara 30 memperuntukkan bahawa Pengarah-Pengarah menurut budibicara mereka menolak untuk mendaftarkan mana-mana pindahmilik tanpa memberikan sebarang alasan. FSB merupakan sebuah syarikat awam sekatan yang sedemikian akan dipertimbangkan dengan tegaskan oleh mahkamah-mahkamah. Apa sahaja yang telah dibincangkan di mesyuarat pertama syarikat telah digantikan dengan M&A FSB tersebut.

[8] Satu-satunya aset FSB datang daripada wang yang dimasukkan ke dalam syarikat oleh pemegang-pemegang sahamnya sebagai modal dan oleh ibubapa sebagai yuran dan deposit-deposit yang boleh dibayar balik. G3 merupakan penggerak utama sekolah tersebut dan sebagai jawatankuasa pro-tem, mereka telah mengambil langkah-langkah untuk memperbadankannya dengan bantuan penasihat-penasihat undang-undang dan pihak-pihak berkuasa. Mereka adalah secara berkesannya merupakan penganjur utama FSB. Penganjur-penganjur mempunyai kewajipan di sisi undang-undang untuk tidak membuat sebarang keuntungan secara rahsia hasil daripada penganjuran syarikat tanpa kebenaran syarikat dan mereka telah juga mendedahkan kepada syarikat apa-apa kepentingan yang mereka miliki dalam mana-mana transaksi yang dicadangkan supaya dimasuki oleh syarikat tersebut. Penganjur-penganjur merupakan pemegang-pemegang amanah kesemua aset dan hak yang mereka perolehi bagi syarikat dalam pembentukannya. Segala-galanya yang diletakkan ke dalam nama syarikat ketika pemerbadanannya, menjadi

kepunyaan syarikat itu dan hanya kepada syarikat itu sahaja, dalam ketiadaan had demi ertikata yang sebenarnya dalam M&A tersebut atau dalam satu kontrak rasmi, yang disempurnakan selepas pemerbadanan dengan pengetahuan sepenuhnya serta persetujuan kesemua pemegang-pemegang saham. Keputusan oleh mahkamah rendah, bahawa FSB merupakan pemegang amanah bagi ahli-ahli pengasas tidak sanggup diteliti dengan tegasnya.

[9] Pengharapan ke atas *Re Vandervell Trusts* sesungghunya telah disalah letak. Sekiranya FSB telah menjadi ejen atau pemegang amanah bagi G3, FSB tidak mungkin mempunyai hak kontraktual untuk mendakwa atau didakwa ke atas kontrak-kontrak yang dibuat dengan PGK Sdn Bhd dan Bitaria, menurut s. 183 Akta Kontrak 1950.

[10] Petisyen itu merupakan petisyen penyumbang-penyumbang. Keenam-enam pempetisyen tersebut ditentang oleh 57 pemegang-pemegang saham dan 98 pemiutang yang mana menentang petisyen tersebut. Mereka tidak mahukan syarikat itu digulung. Ianya merupakan salah arahan yang serius untuk tidak semata-mata menghiraukan pendapat mereka di bawah alasan itu, atau di bawah alasan yang adil dan saksama. Adalah seharusnya diambil perhatian bahawa resolusi yang diluluskan merupakan resolusi-resolusi yang khas dan ianya memerlukan sokongan sekurang-kurangnya 75% kehadiran pemegang saham dan pengundian. Dengan itu kes pempetisyen di bawah s. 218(1)(f) merupakan sesuatu yang tidak boleh dibankitkan.

[11] Tidak terdapat perkongsian tersirat atau nyata antara G3 dan pemegang-pemegang saham induk yang lain sebelum pemerbadanan atau selepasnya. Kesemua resolusi-resolusi FSB diluluskan dengan undi majoriti yang ditetapkan oleh M&A FSB dan Akta Syarikat 1965. Dengan itu tidak terdapat analogi antara kes semasa ini dan keputusan-keputusan kedua-dua perkongsian-kuasi tersebut terhadap yang mana mahkamah rendah telah bergantung. Mahkamah tersebut tidak boleh dalam mengejar apa yang dianggapkannya sebagai adil tidak mempedulikan perjanjian-perjanjian antara pihak-pihak tersebut. Perjanjian-perjanjian ini ditunjukkan dalam dokumen-dokumen tersebut dan dalam M&A FSB.

[12] Perkara-perkara yang tidak diplidkan tidak boleh dijadikan wajar dengan keterangan afidavit. Aduan-aduan yang dibuat oleh pempetisyen dalam afidavit-afidavit mereka telah tidak diplidkan dalam petisyen dan ianya dengan itu tidak seharusnya diuruskan oleh Mahkamah. Dalam menguruskannya, mahkamah dengan mudahnya boleh dikelirukan untuk menganggapkan pengataan semata-mata sebagai keterangan yang membentuk sesuatu kes.

[12a] Aduan-aduan pempetisyen telah tidak dibuat menurut cara yang ditetapkan di mesyuarat-mesyuarat tersebut. Jika satu penangguhan diperlukan, ianya adalah terpulang kepada pempetisyen untuk membuat satu cadangan yang rasmi supaya satu pengundian dilaksanakan dan jika dilaksanakan, maka mesyuarat itu haruslah ditangguhkan. Melalui per. 70, pengerusi hanya boleh menangguh mesyuarat tersebut dengan persetujuan mesyuarat dan haruslah melakukan sedemikian jika diarahkan oleh mesyuarat itu dan ianya tidak terpulang kepada mahkamah untuk menyatakan bahawa mesyuarat tersebut seharusnya ditangguhkan semata-mata kerana mahkamah fikirkan ianya adil untuk bertindak sedemikian.

[12b] Melalui per. 97(2), FSB boleh melantik sesiapa sahaja untuk menjadi pengarah samada untuk memenuhi kekosongan atau sebagai pengarah tambahan. Jika pemegang-pemegang saham ingin mencadangkan pengarah-pengarah yang lebih, mereka boleh meminta supaya diadakan satu mesyuarat sepertimana yang diperuntukkan oleh per. 58 M&A tersebut dan s. 144 Akta tersebut.

[13] Seksyen 149(1)(b) Akta tersebut mestilah dipatuhi. Jika pada masa-masa yang lalu pemegang-pemegang saham telah mengingkari undang-undang kerana kejahilan, itu tidak bermakna bahawa mereka boleh terus melakukannya bebas daripada sebarang hukuman. Sesuatu amalan yang tak sah tidak boleh menjadi sah hanya dengan penggunaannya.

[14] Seksyen 123(4) Akta tersebut memperuntukkan bagi ahli-ahli yang ingin dilantik bagi menjadi pemegang-pemegang jawatan untuk menyerah simpan pengisytiharan berkanun dengan Pendaftar Syarikat serta Penerima Rasmi, sebelum mereka dilantik. Akta tersebut juga mempunyai peruntukan bagi penalti-penalti dalam keadaan ketidak-patuhan. Ianya tidak wajar bagi mahkamah rendah untuk memutuskan bahawa ianya adil dan saksama untuk mendenda FSB kerana melakukan apa yang dikehendaki oleh undang-undang untuk dilakukan olehnya.

[15] Petisyen penyumbang merupakan tindakan kelas dan mesti dimulakan bagi pihak kesemua pemegang-pemegang saham. Keenam-enam pempetisyen tersebut menentang yang selebihnya dari pemegang-pemegang saham tersebut supaya aset-aset syarikat boleh diambil dan secara berkesannya diserahkan kepada G3, dua daripada mereka bukannya pemegang-pemegang saham. Pempetisyen-pempetisyen telah memberikan bantuan mereka dalam memfailkan petisyen itu bagi tujuan yang tidak wajar dan atas alasan itu petisyen tersebut seharusnya ditolak.

[15a] Di mana orang-orang luar menuntut bahawa hartanah yang berdaftar atas nama sebuah syarikat berhad sebagai hak mereka, jalan yang sewajarnya adalah untuk memfailkan satu guaman sivil dalam detinue atau penukaran ataupun satu pengisytiharan bahawa hartanah itu dipegang oleh syarikat tersebut dalam amanah bagi pihak penuntut. Menggunakan sebilangan minorit kecil pemegang-pemegang saham, sepertimana yang dilakukan dalam kes yang terdapat di hadapan mahkamah untuk memusnahkan gedung korporat melalui satu petisyen penggulungan merupakan penyalahgunaan proses mahkamah.

[15b] Dimana dua kumpulan pemegang saham menentang antara satu sama lain berhubung dengan dasar syarikat, cara yang wajar untuk menyelesaikan pertikaian yang sedemikian ialah dengan cara proses demokratik pengundian majoriti. Dalam kes semasa ini, M&A FSB mengandungi perlindungan-perlindungan sedia ada untuk mencapai perkara ini, sepertimana juga Akta tersebut. Dengan itu jika majoriti pemegang-pemegang saham FSB tidak gemarkan apa yang telah berlaku di mesyuarat-mesyuarat itu, mereka sepatutnya telah menuntut satu mesyuarat yang baru dan mengundi supaya Lembaga yang baru dikeluarkan.

[16] Bantahan atas alasan penggandaan telah diterima dengan baiknya dan mahkamah rendah seharusnya membuat keputusan yang memihak kepada FSB. Terdapat ramifikasi yang mana telah berbangkit daripada isu penggandaan, kerana keempunyaan permit-permit, keempunyaan aset-aset FSB dan ketaksahan yang didakwa mengenai keempat-empat mesyuarat pemegang saham adalah kesemuanya merupakan persoalan biasa undang-undang dan fakta dalam tindakan semasa dan dalam kedua-dua prosiding yang lain itu. Perlawanan adalah antara G3 di satu pihak dan FSB serta Pihak Berkuasa Pendidikan di pihak yang lain. Setakat mana G3 telah melibatkan diri mereka dalam prosiding di hadapan mahkamah, ianya haruslah diputuskan bahawa isu estopel akan terpakai kepada setiap satu daripada mereka berhubung dengan kesemua perkara yang telah diputuskan dalam rayuan ini.

[17] Petisyen tersebut telah difailkan di bawah s. 218 Akta tersebut. Ianya bukan merupakan petisyen untuk relief daripada penindasan di bawah s. 181 Akta tersebut. Satu-satunya perintah muktamad di bawah s. 221 Akta tersebut ialah untuk mengarahkan satu penggulungan atau untuk menolak petisyen tersebut. Kuasa untuk menguruskan aset-aset syarikat tersebut telah diletakhak pada penyelesai dan bukannya dalam mahkamah. Percubaan mahkamah untuk mengekalkan aset-aset dan sekolah-sekolah tersebut sebagai suatu pertubuhan yang dijalankan supaya ianya dapat diserahkan kepada G3 adalah amat disalahtafsirkan.

[18] Mahkamah-mahkamah seharusnya tidak membuat perintah-perintah terhadap orang-orang yang bukan merupakan pihak kepada prosiding-prosiding tersebut dan yang telah tidak didengar mengapa perintah-perintah yang sedemikian tidak seharusnya dibuat terhadap mereka. Dalam kes semasa ini, jika kos petisyen tersebut harus dibuat oleh pengarah-pengarah Lembaga yang baru dan jika perintah itu sah adalah tidak difahami mengapa satu tindakan yang baru harus difailkan untuk mendapatkannya semula.

[19] Kesemua perintah-perintah yang dirayui telah diketepikan, dan deposit perayu melalui jaminan kos haruslah dikembalikan. Pempetisyen-pempetisyen dikehendaki membayar kos dalam mahkamah di bawah dan dalam mahkamah rayuan kepada perayu. Pempetisyen-pempetisyen dan Sundram akan dikehendaki membayar kos-kos Pegawai Penerima Rasmi yang ditetapkan dan kos-kos yang ditetapkan bagi penyumbang-penyumbang serta pemiutang-pemiutang yang telah menentang petisyen tersebut dalam mahkamah rendah. Tidak akan terdapat sebarang perintah bagi kos untuk penyumbang-penyumbang dan pemiutang-pemiutang kerana mereka hanya merupakan *amici curiae*.

[Rayuan dibenarkan; perintah Mahkamah Tinggi diketepikan.]

Cases referred to:

Ebrahimi v. Westbourne Galleries Ltd & Ors [1972] 2 All ER 492 ***(cit)***
Indrani Rajaratnam & Others v. Fairview Schools Bhd [1997] 3 CLJ 460 ***(ovrd)***
Lai Kim Loi v. Dato Lai Fook Kim & Anor [1989] 2 MLJ 290 ***(refd)***
Lim Kit Siang v. UE (M) Bhd & Others [1981] 1 MLJ 35 ***(cit)***
Nana Offori Atta II v. Nana Abu Bousra II [1957] 3 WLR 830 ***(cit)***
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Re Blue Arrow Plc [1987] BCLC 585 ***(refd)***
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Re Chesterfield Catering Co Ltd [1976] 3 WLR 879 ***(refd)***
Re Eddystone Marine Insurance [1893] 3 Ch 9 CA ***(cit)***
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Re JE Cade & Son Ltd [1992] BCLC 213 ***(refd)***
Re Laverton Nickel NL [1997] 3 ACLR 945 ***(cit)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(cit)***
Re Mawcon Ltd [1969] All ER 188 ***(cit)***
Re Securities Insurance Co [1894] 2 Ch D 410 ***(refd)***
Re Sin Lee Sang Sawmill Sdn Bhd [1990] 1 MLJ 250 ***(cit)***
Re Vandervell's Trusts [1974] 1 All ER 47
Re Yenidje Tobacco Co Ltd [1916] 2 Ch D 426 ***(cit)***
See Teow Guan & Ors v. Kian Joo Holding Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***
Sio Koon Lin v. SB Mehra [1981] 1 MLJ 225 ***(cit)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1991] 3 CLJ 2078 ***(refd)***

Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim [1997] 2 CLJ 315 ***(cit)***
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Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd [1996] 1 CLJ 393 ***(refd)***
United Malayan Banking Corp v. Palm & Vegetable Oils [1993] 1 MLJ 206 ***(cit)***
Wei Giap Construction Co (Ptd) Ltd v. Intraco Ltd [1979] 2 MLJ 4 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 4, 14A, 33, 64, 67, 123(4), 128, 144, 149(1)(b), 181, 218 (1)(e), (f), (i), 219(2), 221(1), 226(3), (4), 243, 253(2), 289, 364
Companies (Winding-up Rules) 1972, r. 28
Contracts Act 1950, s. 183
Courts of Judicature Act 1964, ss. 44, 67
Education Act 1961, ss. 2, 44, 45, 46, 47, 48(2), 49, 53
Evidence Act 1950, s. 114(e)
Government Proceedings Ordinance 1956, s. 29
Rules of the High Court 1980, O. 18 r. 19, O. 59 r. 19, O. 88 r. 5, O. 92 r. 4

Other sources referred to:
Australian Corporation Law, 1991, vol 2, para 5.4.0215
Company Law, Walter Woon, p 500
Gower's Modern Company Law, 4th edn
Halsbury's Laws of England, 4th edn, vol 7, para 1395
7 Halsbury's Laws of England, 4th edn, p 607
Mallal's Supreme Court Practice Note, 20/3/1, p 248
Palmer's Company Law, 20th edn, p 701
Palmer's Company Precedents, 17th edn, part I
Pennington's Company Law, 5th & 6th edns
Supreme Court Practice, 1985, Note 20/3-4/1, p 33

[Appeal from High Court Malaya, Kuala Lumpur; Companies Winding-Up No: D5-28-280-1994]

For the appellant - WSW Davidson (Conrad Young with him); M/s Azman, Davidson & Co
For the opposing contributories/creditors - Raja Aziz Addruse (P Gananathan & Robyn Choi with him)
For the official receiver - Nordin Badaruddin
For the respondents - Yusuf Khan; M/s Yusuf Khan & Pathmanathan

JUDGMENT

Mahadev Shankar JCA:

Judgment 1

This is an appeal against an order to wind-up the appellant (the company). The company's application in the High Court for a stay of the winding-up proceedings was refused. The appeal was initially listed for hearing on 30 August 1997.

In the High Court Messrs. Azhar & Wong filed a notice of intention to appear on petition on behalf of 98 "creditors" whose children were then studying in the Fairview Schools, and another such notice on behalf of 57 persons who were contributories each holding 50 shares in the company. Mr. Davidson was instructed to represent them as counsel. They (the opposing contributories and creditors) opposed the petition. So did the company. There was no conflict of interest.

The petitioners were also contributories of the company. Mr. P.S. Sundram owned no shares in the company. He was the only person who appeared to support the petition. He had earlier filed a civil suit against the company which was still pending.

After being served the appeal record the respondents filed a motion praying for an order that:

(i) the appeal be struck out on the ground that the persons who had brought it had no *locus standi;*

(ii) alternatively that the directors of the company pay into court RM50,000 by way of deposit as security for costs and expenses incidental to this appeal;

(iii) that the costs of this application be paid by the respondents in any event.

These respondents who were the petitioners in the court below are hereafter referred to as "the petitioners".

Another motion was filed by one Pargash Singh and Chee Soo Teng (the proposed interveners) praying that they be permitted to intervene in this appeal. At all material times, the children of the proposed interveners had been pupils in the schools, and both of them were contributories of the company in the sense that each held 50 shares in the company. Their names were not included in either of the lists of persons intending to appear in the High Court. Pargash Singh and Chee Soo Teng claimed in this appeal that they would be representing the interests of the opposing contributories and creditors.

On 3 July 1997 Chian Ngook For filed an affidavit exhibiting the resolution of the board of directors made on 10 December 1996 that the company do prosecute this appeal and Azman Davidson & Co. be appointed to act for the company.

The appeal eventually came up for disposal on 6 October 1997. We heard the motion to intervene first. Raja Aziz, as counsel for the proposed intervener referred us to s. 289 of the Companies Act 1965 (the Act) which encourages the court to have regard to the wishes of the creditors and contributories "as

to all matters relating to a winding-up". He also referred to *Wei Giap Construction Co. (Ptd) Ltd. v. Intraco Ltd.* [1979] 2 MLJ 4 @ p. 6 where D'Cotta J dealt with s. 289 of the Singapore Act and referred to *Palmer's Company Law* (Twentieth Edn.) at p. 701. *Infraco* obtained the order to wind-up because *Wei Giap* was unable to pay its debt. Some of the creditors opposing the petition had filed affidavits in the High Court claiming that if *Wei Giap* was allowed to continue to operate, their chances of recovery would be greater. These creditors had not filed any independent appeal. The only named appellant on record against the winding-up order was *Wei Giap,* and the opposing creditors were not separately represented in the appeal. The issues before us are not the same.

Raja Aziz said that in addition to the proposed interveners he also represented the opposing contributories and creditors, on whose behalf a submission had been made to the trial judge by Mr. Davidson. He further stated that since there was no set procedure as to how creditors or contributories could inject themselves into the appeal the application was being made *ex abundanti cautela.*

Encik Yusuf Khan's first submission was that as there was nothing in the Companies (Winding-up) Rules 1972, (the Winding-up Rules) permitting intervention the application was misconceived. He said the Rules of the High Court 1980 (the RHC) were irrelevant. He relied on *Lai Kim Loi v. Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 at 295 where the judgment reads:

> On the other hand, an order for a company to be wound up on a petition under s. 217 of the Companies Act 1965 may only be made by a court if one of the circumstances specified in the following s. 218 (1) of the Companies Act has been proved: ... (Section 218(1) of the Act was then set out and the judgment continues) "In such a case the Rules of the High Court 1980 do not apply."

(We are not sure if this is the judgment of YAA Gunn Chit Guan as stated at p. 290 or YAA Lee Hun Hoe as stated at p. 291).

His second submission was based on a passage of *Halsbury's Laws of England* (Fourth Edn.) vol. 7 para. 1395 the relevant portions of which read as follows:

> **1395. Appeal from winding up order.** An appeal against a winding up order may be brought by a creditor, or contributory who has appeared in the winding up court or by the company itself[1]. *If the company is the only appellant, security for the costs of the appeal must be given, not out of the company's funds, but from an outside source, namely by the directors or shareholders who are supporting the appeal, and the security must be substantial*[2].

> An appeal from a winding up order may be brought without the leave of the court, as the order is a final order and not an interlocutory judgment.

The relevant portions of the footnotes relied on read as follows:

> [1]*Re Diamond Fuel Co* [1879] 13 Ch D 400, CA; *Re Photographic Artists' Co-operative Supply Association* [1883] 23 Ch D 370, CA. Contributories or creditors who have not appeared below cannot appeal with leave: *Re Securities Insurance Co* [1894] 2 Ch 410, CA. Other interested persons have no right to appeal, but may be heard as *amici curiae*: *Re Bradford Navigation Co* [1870] 5 Ch App 600.

> [2]*Re Consolidated South Rand Mines Deep Ltd* [1909] WN 66, CA; *Re E.K. Wilson & Sons Ltd* [1972] 2 All ER 160, [1972] 1 WLR 791, CA. Except in special circumstances, application for security must be made before the appeal is in the paper for hearing: *Re Indian, Kingston and Sandhurst Mining Co* [1882] 22 Ch D 83, CA. If notice of appeal has been given but not set down, it is doubtful whether the court has such seisin of the appeal as to be able to order security.

The distinction between final and interlocutory orders made in Halsbury is not relevant to us. (See s. 67 of the Courts of Judicature Act 1964). In the court below the title to the petition proclaimed that it was filed under s. 218 of the Companies Act. Order 88 r. 5 of the RHC does not refer to applications to wind-up under s. 218 of the Act. Therefore the initiation of such petitions, their form, service, advertisement, mode of involvement of interested persons etc. must of necessity be governed by the special provisions contained in the Winding-up Rules. We are unable however to countenance Encik Yusuf Khan's contention that interested parties are so strait-jacketed by the Winding-up Rules as to be without a remedy on matters where these rules are silent.

For ourselves we would give a liberal interpretation to s. 253(2) of the Act which reads as follows:

> **253 Powers of court cumulative**
>
> (2) Subject to the **rules** an appeal from any order or decision made or given in the winding up of a company shall lie in the **same** manner and subject to the **same** conditions as an appeal from any order or decision of the **court** in cases within its ordinary jurisdiction.

By s. 4 of the Act the "court" referred to means the High Court or a judge thereof and "rules" means the rules of the court. Consequently we think that where the Winding-up Rules make specific provision for a particular matter it would exclude a parallel provision in the rules of the court but where the Winding-up Rules are silent on a matter which is pending before the court, the court must apply its own procedure where express provision exists. If not

it can always resort to O. 92 r. 4 of the RHC. The powers of the court on hearing a petition provided by s. 221 of the Act are exercised in conformity with RHC and the appeal is a rehearing.

The passage from Halsbury just cited supports the view that the contributories and creditors who **appeared** in the court below had an independent right of appeal. They would indeed be well advised to exercise that option, if they wish as of right, to address the appellate court to vary or set aside the High Court order.

Pargash Singh and Chee Soo Teng were **NOT** persons who had appeared in the court below. They therefore had no right of appeal without leave. Such leave is required not because they are interveners but because they are "parties" who allowed the judgment to be made against their interests by default of appearance. The point to note here is that in a s. 218 petition the service is by advertisement. Consequently all creditors and contributories are "parties" who are deemed to be served and can participate in the proceedings. Whether or not they appear they will be bound by the winding-up order because s. 226(4) of the Act deems that a winding-up order is made on the joint petition of all creditors and contributories. When it comes to appealing we adopt Lindley LJ's remarks in *Re Securities Insurance Company* [1894] 2 Ch. D. 410 at p. 413 where he said:

> I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially effected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it, but without leave he is not entitled to appeal.

and later on at p. 413 he concluded:

> I think the rule under the old Chancery practice is perfectly well settled; and even in the winding-up of companies with which I was once familiar, I do not recollect a case of a person who alleged himself to be aggrieved appealing without leave, unless he had in some way or other made himself a party to the proceedings.

So a contributory or creditor in a winding-up is a party, and not an intervener in the sense of *Tradium Sdn. Bhd.* who sought to inject themselves into the proceedings reported in [1995] 1 MLJ 668. Wilful failure to participate in the proceedings and acquiescing in the order made will provide grounds for refusal of leave. Pargash Singh and Chee Soo Teng did not explain why they had not appeared in the court below.

In the result we were unanimously agreed that the application by Pargash Singh and Chee Soo Teng to intervene be dismissed with costs.

This however did not resolve the position of the other 57 contributories and 98 parents who had appeared in the court below. Raja Aziz said he was acting on their behalf also. They had filed the notices required of them by r. 28 of the winding-up rules and affidavits in opposition. Nothwithstanding the use of the word "may" in s. 289 of the Act it is the opinion of this court that the wishes of the creditors and contributories **must** be taken into account if relevant. (See also *Company Law* by Walter Woon p. 500 at note 61; *Australian Corporation Law* vol. 2 [1991] Butterworth para. 5.4.0215) They have a right to be heard in the court of first instance. But whether the court in fact does make the winding-up order is an exercise of discretion because the use of the word "may" in s. 218(f) of the Act is permissive. This is well established by authority.

As to whether these 57 contributories and 98 parents had a right to be heard on the appeal our view is that unless they had filed a notice of appeal they have no right. Otherwise they may substantially add to the cost of the appeal without running any corresponding risk of compensating other parties who may be injuriously affected by the protraction of the proceedings. Nevertheless following *In re Bradford Navigation Company* [1870] LR5 Ch. App 600 that the court may reasonably hear other persons who had an interest in the company as *amici curiae*, we indicated to Raja Aziz that we would hear him on the substantive appeal if he was minded to address us.

This was of course subject to the competence of the substantive appeal which Encik Yusuf Khan wished us to strike out.

In *Sri Hartamas Development Sdn. Bhd. v. MBF Finance Bhd* [1991] 3 MLJ 325, YAA Hashim Yeop A. Sani after reviewing the authorities said at p. 327:

> *Re Diamond Fuel Company* [1879] 13 Ch D 400 is also authority for the proposition that, despite the fact a liquidator had been appointed, a residual power of appeal remains vested in the directors.
>
> After a winding-up order is made, generally speaking no one but the liquidator can act on behalf of the company. But it is quite clear that the company has a right to be heard to say that the winding-up order is wrong and to appeal against the order. In our case it is expressly provided in s. 253(2) of the Act. The only question is who should move the appeal on behalf of the company.

This decision was applied in *Taman Sungai Dua Development Sdn. Bhd. v. Goh Boon Kim* [1997] 2 CLJ 315 at p. 59. *Re Mawcon Ltd.* [1969] All ER 188 at 192 and *Re Laverton Nickel NL* [1997] 3 ACLR 945 are also useful.

a For the avoidance of any doubt we state here that the omission of the company to obtain a stay of the winding-up order under s. 243 of the Act in no wise limits the residual powers of the directors to prosecute an appeal. A winding-up order which relates back to the date of the filing of the petition [see s. 219(2)] generally means the company must stop trading. All actions against b the company are stayed as per s. 226(3) of the Act and the liquidator then proceeds to evaluate the company's liabilities and to gather in the assets for distribution. A stay of the winding-up means the company is free to continue trading. The absence of a stay does not affect the appellate process, albeit an appeal by itself does not amount to a stay of execution.

c On the question of security for the costs of the appeal, we were again referred to the passage from Halsbury earlier cited. The two cases in the second footnote can both be distinguished on the facts. All matters concerning costs are in the discretion of the court and how a discretion should be exercised will vary from case to case. One unusual feature here is that the trial judge d did not make any order of costs against Fairview Schools Berhad. He ordered costs to the petitioners but absolved the company of any liability to pay the costs. So if this appeal was dismissed the company would still have no liability for the costs below. The judge said the directors who took over the board on 11 November 1993 *(sic.)* should pay the costs of this petition and that the e petitioners do file an action against them for recovery of their costs. The order refers not to the directors but "those responsible for the problem raised at 11 November 1992 and 28 August 1994 meetings without identifying them. None of them were named as respondents to the petition, nor was any relief claimed against them in the petition itself. An order was made against them f without their being heard.

We did not have to go into these matters because to avoid any further delay Mr. Davidson gave his firm's solicitors' undertaking to be responsible for the payment of any costs of this appeal this court may order to be paid to the petitioners. Encik Yusuf Khan agreed and both parties left the amount of the g security to the discretion of the court.

After due consideration, we limited the sum required by way of security for the costs of this appeal at RM30,000 only. We made no order as to costs of this second motion because Encik Yusuf Khan's success on the issue of security was neutralised by the failure of his application to strike out.

h

Creditors and contributories who wish to support the winding-up order stand in different position from those who want it varied or set aside. We think they have a right to be heard in the appeal as "respondent" provided they put themselves on record by invoking s. 44 of the Courts of Judicature Act 1964. i Encik P.S. Sundram had not done so but in as much as we agreed to hear

Raja Aziz we also agreed to allow Encik P.S. Sundram to address us in the substantive appeal which is the subject of a second judgment.

Judgment 2

This appeal is to determine whether the High Court was right to order the winding-up of Fairview Schools Berhad (FSB). The judgment is now reported as *Indrani a/p Rajaratnam & Others v. Fairview Schools Berhad* [1997] 3 CLJ 460. For reasons which will follow later the salient facts have to be restated.

The respondents in this appeal were the petitioners in the court below. They are referred hereafter as the petitioners. Their whole case was based on an assertion that the permit issued by government to run the schools belonged to Ahmad Roose, P.S. Sundram (Sundram) and Dr. I.U. Malik (hereafter referred to as the group of 3 or G3 for short). They claimed that FSB was merely a trustee of all its assets for the G3. They even claimed that the liabilities of FSB were the personal concern of the incumbent directors of FSB after 11 November 1992.

The point of origin of these claims is a letter dated 28 July 1978 from the Ministry of Education (the Ministry's letter). There is a purported copy of the Ministry's letter dated 28 July 1978 annexed to Sundram's written submission (1st vol Appeal Record p. 79, 3rd vol Appeal Record p. 619) in the court below. It is not signed. The letter head contains the Ministry's fax number.

Ahmad Roose also exhibited a purported copy of this letter in his affidavit affirmed on 20 January 1995 (2nd vol Appeal Record p. 514, 3rd vol Appeal Record p. 859). It is a photostat of the same document. It is also not signed.

The third copy of the Ministry's letter was exhibited by Puan Arpah bte Haji Mohamad, the Deputy Director-General of Education in her affidavit of 19 April 1996. Sundram had filed a civil suit S4-22-594-93 on 4 October 1993 for declaratory relief alleging wrongful dismissal from his post as managing director of FSB. The winding-up petition was filed on 25 August 1994. Before the winding-up petition was heard the G3 filed Originating Motion No. R1-25-9-25 against the chief registrar of schools and the Ministry of Education for a mandamus. The object of this exercise was to restore Ahmad Roose as the permit holder as opposed to K. Balan Thurasingham (KBT). The civil suit and the mandamus proceedings have been put on hold pending the disposal of this appeal. The files relating to those matters are not before us. However Puan Arpah's affidavit aforesaid which was filed in the mandamus proceedings was introduced into evidence in this matter without objection in the court below. It contains the only signed and authentic file copy of the Ministry's letter (1st vol Appeal Record p. 243). The date 28 July 1978 has been

overwritten to read 3 August 1978 and the letter is signed by P. Navaratnarajah. The authenticity of the date 3 August 1978 is confirmed by Ahmad Roose's reference to it in his letter dated 1 March 1979. Since faxes were not in use in 1978 it must follow that the unsigned copies relied on by Sundram and Ahmad Roose are of a later vintage. The contents of all three letters however are identical, so nothing should turn on this.

The proper interpretation to be placed upon this letter is hotly disputed. Whilst the G3 may have been the active individuals concerned in setting up the Fairview Schools the first paragraph of this letter categorically states that the request to set up schools named "fairview schools association" at 40 Jalan Utara, Bukit Bintang and 216 Jalan Pekeliling, Kuala Lumpur came **not** from any or all the individuals of the G3 but from the parent-teacher association of the garden school. The Fairview Schools Association is hereafter referred to as FSA. The Ministry's letter is addressed not to Ahmad Roose but to the registrar of schools. The second paragraph states that the Ministry has no objection in principle to the establishment of such schools because it was intended for expatriate children and was not profit oriented. The third paragraph directed the registrar to issue a temporary certificate (not to Ahmad Roose personally) but to the chairman of the schools subject to nine conditions of which only the following conditions are material:

(i) the name of the schools is Fairview Schools Association;

(vii) the audited account of the schools for each year and statements of account be sent to the registrar and the Ministry;

(viii) the schools, teachers and members of the board must be registered.

It was not a condition that the schools should be non-profit making.

The fourth paragraph of this letter required the registrar to inform the chairman of the schools that the nine conditions enumerated cannot be changed without the written permission of the Ministry. The fifth paragraph stated that provided the conditions were observed the temporary certificate could be extended.

A copy of this letter was extended (not to Ahmad Roose personally) but to the chairman of Fairview Schools Association, at Section 6, Lorong Damai Lapan, Kuala Lumpur which is Ahmad Roose's residential address.

The proper inferences as to the history of the Fairview Schools are that the parent-teacher association of the garden school decided to set up an alternative international school. Its members described itself as Fairview Schools Association. Ahmad Roose was appointed pro-tem chairman. In the name of the parent-teacher association a request was made to the Ministry of Education

for approval to set up an alternative international school. By its letter dated 28 July 1978 the Ministry of Education gave its blessings to their project.

The original certificates issued in 1978 are not in evidence. The earliest copy in the appeal record dates from 11 April 1983 (3rd vol Appeal Record p. 701). However according to a statement by Sundram the first certificates were issued on 1 September 1978. He stated:

Butir-butir Sijil Pendaftaran Sementara Sekolah (SPSS) dan Pengerusi Lembaga Sekolah Fairview Dari Tahun 1978 hingga 1994

1. 1 September 1978 – SSPSS pertama kali dikeluarkan atas nama:

a) Persatuan Sekolah Menengah Fairview – No. SPSS. JPWP: 720

b) Persatuan Sekolah Rendah Fairview – No. SPSS. JPWP: 721

c) Persatuan Taman Kanak-kanak Fairview – No. SPSS. JPWP: 722

Alamat: 216, Jalan Pekeliling
Kuala Lumpur

Nama pengerusi yang tercatit dalam ketiga-tiga SPSS itu ialah:

Encik Ahmad Roose b Hj Mohd Ali

Alamat: Sentosa 6, Lorong Damai 8,
Kuala Lumpur

These certificates are also referred to as "permits" or "sijil".

At this juncture it must be emphasised that there never was at any time a legal entity registered as "Fairview Schools Association" (FSA). Indeed in 1983 the names of all three permits were changed to Sekolah Fairview (Menengah), (Rendah) and (Tadika) respectively whilst the certificate numbers remained the same ie, 720, 721 and 722.

Sundram claims that under the first three certificates the G3 commenced to conduct classes at 216 Jalan Pekeliling. Their concept of the institutional framework under which they were to operate was the subject of legal advice. The only reasonable inference from Ahmad Roose's letter dated 17 November 1978 (3rd vol Appeal Record p. 882) is that after the parent-teacher association of the Garden School had decided to set up FSA the association had applied to the registrar of companies for approval to incorporate **a limited company** named Fairview Schools Association. Indeed there is evidence under the hand of Ahmad Roose himself that even before the sanction of the registrar of companies had been obtained, the G3 had printed letterheads (1st vol Appeal Record p. 246) describing themselves as "The Fairview Schools Association

(a company limited by guarantee)". It is a fair inference that this was the style under which they did business until the Registrar of Companies rejected the name. The statement that FSA was a company limited by guarantee was false. (See s. 364 of the Companies Act 1965). Indeed such a company is prohibited by s. 14A of the Companies Act.

It is also obvious from that same letter dated 17 November 1978 (3rd vol Appeal Record p. 882) written by Ahmad Roose to the manager of Bank Bumiputera that Ahmad Roose was holding himself out as a director of this company and that 21 cheques had been collected from the parents. Ahmad Roose directed the Bank Manager to open an account in the name of Fairview Schools Berhad and pay all the cheques into that account. The second paragraph of this letter reads:

> You will note that some of the cheques are made payable to the Fairview Schools Association while others are made payable to Fairview Schools Berhad or Fairview Schools. The **beneficiary** in all cases is the Fairview Schools Berhad. (The change in the name of the school became necessary when the Registrar of Companies did not accept the name of the company as the Fairview School Association). A copy of the memorandum and articles of association of the Fairview Schools Berhad is attached. At the moment, the official certificate of incorporation of the company is awaited and will be forwarded to you as soon as it becomes available. (Emphasis added)

Turning to the memorandum and articles of association (the M & A) of the FSB it is observed that the two subscribers who signed the M & A on 9 November 1978 in the presence of their solicitors, were Hashimah bte Abdul Aziz who is the wife of Ahmad Roose and Indrani a/p C. Rajaratnam who is the wife of Sundram.

The M & A is a fairly standard document. The first object clause in the memorandum of any company has always been treated with the utmost reverence as representing the primary or predominant purpose for which the company has been set up. In this case it reads:

> (1) To establish and carry on in Malaysia and/or elsewhere schools colleges or institutions of education or learning and to provide facilities for the advancement of education, whether general commercial professional or technical, except that such education shall not be of a political nature.

Nowhere in the M & A does it state that FSB's role was to act as a trustee or manager only and that the beneficiary and owner of the assets of the schools was to belong to the G3 or anyone else. The name of the company was thus not an alias or style under which the G3 was trading.

Again nowhere in the M & A is there any provision for founder shares for the G3 or any hint that ownership or control of FSB's assets should be retained by the 63 (as to this see *Modern Company Law* by L.C.B. Gower (Fourth Edn) p. 333 especially note G3 and *Re Eddystone Marine Insurance* [1893] 3 Ch. 9 CA). Under the M & A all shareholders had equality of rights and votes. It is trite law that the M & A represents the contract *inter se* between all members of the company (see s. 33 of the Act).

Five days after FSB's Bank account was opened as aforesaid, 29 parents attended a meeting at the schools' premises. The G3 were present with their wives. So were 11 teachers. Minutes of this meeting captioned **Fairview Schools Berhad** are in evidence (3rd vol Appeal Record p. 696). Ahmad Roose was elected chairman. Sundram was voted ad hoc secretary. The relevant minutes read:

> The chairman expressed his appreciation for the confidence placed in him and proceeded to give a status report on the developments in relation to the schools. He outlined some of the problems relating to the setting up of a nonprofit company and the name proposed for it.
>
> After discussions with the Legal Firm (Tunku Zuhri, Manan & Abdullah) and the Registrar of Companies **the members of the protem committee** (Encik Ahmad Roose, Dr. I.U. Malik and Mr. P.S. Sundram) have decided on the following: (Emphasis added)
>
> (i) The name of the company will be Fairview Schools Berhad.
>
> (ii) Steps have been taken to register the company which will be done soon.
>
> (iii) The subscribing shareholders were Puan Hashim Roose and Mrs. Indira Sundram.
>
> (iv) The number of shareholders will be more than 50.
>
> (v) The authorised capital of the company will be RM200,000.

The meeting after some discussion also made the following decisions:

> (i) Each share will cost RM50 and one family will purchase one share.
>
> (ii) The share should be transferable and when a parent whose child or children is/are withdrawn from the school the share will be transferred to the next parent on the list or the next in coming parent. As for the parents who have to leave the country by a certain date the board of directors will devise a scheme to purchase the shares pending resale to another parent.

(iii) The share costs will not be deducted from the deposit because of the audit and Inland Revenue implications and again because the deposit being by definition and intent refundable should refunded in full on receipt of a demand notice of reasonable time.

The story that these minutes tell is that all those present and not just the G3 took part in settling the key issues relating to the establishment of the company including its name, its authorised capital, number of shareholders, issue of shares, and appointment of office bearers.

FSB was issued with its certificates of incorporation on 18 December 1978. The *sijils* issued on 1 September 1978 being of 6-month duration expired on 28 February 1979. The letter Ahmad Roose wrote to the Ministry on 1 March 1979 is so very significant that it deserves to be set out in full. It reads:

Fairview Schools Berhad

Berhubung dengan surat Kementerian bertarikh 3 Ogos, 1978 membenarkan kami menjalankan sebuah Sekolah Enggeris bernama Fairview Schools Association (ref. Kp5195/17/SEL/A/S.K.IV(22). Dengan hormatnya adalah dimaalumkan bahawa Pendaftar Sharikat2 (Registrar of Companies) telah menolak permohanan kami mendaftarkan sebuah syarikat diatas nama 'The Fairview Schools Association' dengan cara 'limited by guarantee'. Sebaleknya Pendaftar Sharikat itu mendaftarkan syarikat kami diatas nama 'Fairview Schools Berhad' pada 18hb Disember 1978.

Bersama2 ini saya sertakan satu salinan photostat certificate pendaftaran tersebut untuk maaluman tuan.

Tujuan saya menulis surat ini ialah memaalomkan tuan tentang pertukaran nama syarikat kami itu. Sila ambil perhatian.

Terima kasih.

Yang benar,

t.t.

(Ahmad Roose, F.I.BA.) Pengerusi
Fairview Schools

s.k. Ketua Pelajaran, Selangor,
Jabatan Pelajaran,
Jalan Maxwell,
Kuala Lumpur

His letter refers to the Ministry's letter granting permission dated not 28 July 1978 but 3 August 1978 which is also the date of Puan Arpah's file copy attached to her affidavit. Ahmad Roose's own statement as to why the name FSA was changed to FSB and the assertion that Fairview School Berhad was the new name of the company previously known as Fairview Schools Association (a company limited by guarantee) has left us in no doubt that the proposed vehicle or institution remained the same, even though its name and legal character was changed by force of law. Also significant is the designation under which Ahmad Roose signed this letter. "Chairman, Fairview Schools", and his use of the words, "syarikat kami" in his representative capacity.

Ahmad Roose wrote to the Ministry because the first condition imposed by the Ministry's letter was that the name of the schools was "Persatuan Sekolah Fairview". The consent of the Ministry was therefore required to change it to "Fairview Schools".

The Ministry's reply to this letter is not before us. Nor are the *sijils* issued from 1 March 1979 to 11 April 1983. But looking at the *sijils* dated 11 April 1983 it is obvious that the Ministry must have agreed to the change because the name of the schools now reads "Sekolah Fairview (Menengah), (Rendah) and (Tadika)" as the case may be (3rd vol Appeal Record pp. 703, 706 and 707). The *sijil* states that the schools had been registered provisionally (see s. 48 of FM Act 43/61) in accordance with the Education Act 1961 and that the name of the chairman is YM Dato' Ahmad Yunus. In the absence the *sijils* from 1 September 1978 for the total duration of this case we must assume the *sijils* are in prescribed form (see s. 48(2) of FM Act 43/61). The name of the chairman changed from time to time with the full knowledge of Ahmad Roose, Sundram and all others concerned.

The FSA school was started by the G3 on 1 September 1978. FSB was incorporated on 18 December 1978. The minutes of 22 November 1978 describe the G3 as "the pro-tem committee". A committee acts as agent for a principal. The expression "pro-tem committee" in this context can only mean that they were to hold office temporarily for the period the company was in the process of formation and to hand over to its official directors when the company was validly constituted. The meeting agreed they be directors designate, to be formally appointed to the board of FSB, along with Sundram's wife Indrani (the first petitioner**)** and five others. Mrs. Hashimah Roose the current principal was to continue in that capacity in addition to being a non-voting Director *ex-officio.* As to the prospect of the schools making ends meet Sundram is recorded (3rd vol Appeal Record p. 698) as having said on that day:

(vi) Mr. P.S. Sundram estimated on the operating costs of the schools and requested current parents to do their best to recruit more children into the schools. To achieve **break even point** at current costs a students population of 120 was required. But indications are that during the 2nd. Term their target could be achieved if not exceeded. (Emphasis added)

Assuming that each parent at this meeting had two children in FSA on 22 November 1978 that makes only 42 children. The reference to "break even point at current costs" can only mean one thing. Unless 120 students were taken in there would be a cost overrun. The FSA School was therefore running at a loss on 22 November 1978.

Before we focus on the audited accounts to which YA Datuk Mokhtar Sidin directed our attention we need to keep in front of our minds that the working capital of FSB could only come from its share capital and loans if any. The income could only be generated from the fees collected. The first audited accounts are from incorporation on 18 December 1979. The auditors reported that upon incorporation there was a deficit on schools running of RM7,779. A surplus of RM13,952 was added. It is a fair inference that this money could only have come from fees and deposits collected and paid into FSB's Bank account with BBMB (3rd vol Appeal Record p. 882). Between 17 November 1978 when the amount paid in was RM8,956.50 the further fees and deposits collected and banked in must have taken the figure up to RM13,952. As to who was to own the schools' assets Ahmad Roose's own words in his letter are crucial:

The beneficiary in all cases is the Fairview Schools Berhad.

The accounts of its first year of operation (ending 31 August 1979) show that only two subscribers shares had been issued to Mrs. Ahmad Roose and Mrs. Sundram (ie, Hashimah bte Abdul Aziz and Indrani a/p C. Rajaratnam). In other words the issued and paid up share capital for its first year was RM2 only. But the income and expenditure account shows RM180,805 was collected from school fees and miscellaneous fees. The balance sheet shows parents' deposits of RM84,985. The fixed assets of FSB are shown in the notes on the accounts as standing at RM58,637, but depreciated to RM47,603 as at 31 August 1979. All this is shown as belonging not to the G3 but to FSB. Hashimah affirmed the statutory declaration on 17 September 1980 that these accounts were drawn up to give a true and fair view of the company and were correct.

Nowhere in these accounts is there any suggestion that the G3 had injected any tangible assets into the company. Nor was there anything to suggest that there was any liability whatsoever on the part of FSB as trustee to the G3 as beneficiaries for any asset whatsoever.

Thus far it is self evident that the G3 were only three persons amongst those who were the first persons who influenced the gestation of FSB. They conceived the idea of forming this company. As their pro-tem committee the G3 took the necessary steps with the help of their legal advisors and the authorities to incorporate it. They set up the nucleus of the business the FSB was to operate. As the minutes of 22 November 1978 show upon incorporation they intended to hand over control of FSB to its directors. In a word the G3 were the chief "promoters" of FSB in the classic sense that this term is understood in company law (see *Pennington's Company Law* (Sixth Edn) p. 523 *et seq).* By FSB's articles directors were not required to be shareholders. Nonetheless upon appointment such directors would have assumed all the statutory liabilities imposed on company directors.

Promoters have a legal duty not to make any secret profit out of the promotion of the company without the company's consent and also to disclose to the company any interest the promoters have in any transaction proposed to be entered into by the company. *Palmer's Company Precedents* (Seventeenth Edn) Part I *et seq* is authority for the proposition that if a promoter acquires any property for the inchoate company after the commencement of the promotion he is presumed to do so as trustee of the company, "so that he must hand it over to the company at the price he gave for it, unless he discloses not merely the profit he proposes to make but also informs the company of its right to call for the property at its cost price". (See *Gower's Modern Company Law* (Fourth Edn) p. 327) (hereafter referred as Gower).

At pp. 332 and 333 of Gower *(ibid)* is this passage:

> A promoter is not entitled to recover any remuneration for his services from the company unless there is a valid contract, enabling him to do so, between him and the company. Indeed, with such a contract he is not even entitled to recover his preliminary expenses (*Re English and Colonial Produce Co* [1906] 2 Ch 435, CA) or the registration fees and capital fees (*Re National Motor Mail Coach Co)* [1908] 2 Ch 515, CA). In this respect the promoter is at the mercy of the directors of the company. Until the company is formed it cannot enter into valid contract (*Kelner v. Baxter* [1866] LR 2 CP 174; *Natal Land Co v. Pauline Syndicate* [1904] AC *ibid.* It must enter into a new contract and this ought to be under seal since the consideration rendered by the promoter will be past) and the promoter therefore has to expend the money without any guarantee that he will be repaid. In practice, however, recovery of preliminary expenses and registration fees does not normally present any difficulty. The articles will contain a provision authorising the directors to pay them, (Table A, art. 80) and although this does not constitute any contract between the company and the promoter as such, (even if the articles provide that the expenses shall be paid it seems that this will not constitute a contractual liability under s. 20 on which the promoter, if he becomes a member, can sue, see

above, pp. 315-318 and [1971] 87 LQR 377, 369-372), it is sufficient authority to the directors to repay expenses properly incurred *(Re Rotherham Alum Co* [1883] Ch D 103, CA; *Re Engelfield Colliery Co* [1877-1878] 8 Ch D 338 CA. The estimated amount of the expenses by whom they are payable must be disclosed in any prospectus (Sch. 4, pt I, para 12) or statement in lieu (Sch. 3, pt I, and sch. 5, pt. I) and **until written off, the actual amount paid or payable must be disclosed in the company's annual balance sheet** (Sch. 8, pt I, para 3). See also 1978 Bill, cl. 4(3). (Emphasis added)). If, as is generally the case, the promoter is one of the directors, he can be reasonably confident that his expenses will be paid.

The certificates tendered in evidence (3rd vol Appeal Record pp. 866-973) state that they have been issued under s. 48 of the Education Act 1961. The registration of schools is covered by part V of the Education Act 1961. Section 44 makes the registration of all schools mandatory. Section 45 provides for the maintenance of the register in the prescribed form. Section 46 and 47 read:

46. **Application for registration.**

(1) An application for the registration of a schools or educational institution shall be made to the Registrar by the persons applying to be registered as managers or governors thereof or by the persons who will be responsible for the management thereof.

(2) Every application under sub-s. (1) –

(a) shall be in such form as may be prescribed; and

(b) shall be accompanied by applications for registration as a manager or governor of the schools or educational institution by every person named in the application under sub-s. (1).

47. **Restriction on registration**

No schools or education institution shall be registered until –

(a) the persons making application for registration have appointed one of their number to be the chairman of the managers or governors for the purposes of this Act; and

(b) a certificate of the appointment, signed by those persons, has been furnished to the Registrar.

Then follows s. 48 which reads:

48. **Provisional certificates of registration.**

(1) On receipt of an application for registration of a school or educational institution under s. 46 the Registrar may, in his discretion, pending investigation of the application, issue to the person who is to act as chairman of the managers or governors or to the person responsible for the management thereof a provisional certificate of registration in respect of such schools or institution.

(2) Provisional certificates of registration shall be issued in such form and subject to such conditions as may be prescribed.

(3) A provisional certificate may at the discretion of the Registrar be revoked at any time by notice in writing under the hand of the Registrar served on the person to whom the certificate was issued.

The first application submitted prior to September 1978 has not been put in evidence. There is a presumption that all official acts have been regularly performed. (See s. 114(e) of the Evidence Act 1950). So it has to be inferred that the application submitted was in the prescribed form required and that as required by s. 47 the applicants appointed Ahmad Roose to be the chairman of the proposed limited company Fairview Schools Association for the purposes of the Act.

The particulars contained in the certificates Nos. 720, 721 and 722 could only have come from the particulars supplied by the applicants prior to incorporation or from the office bearers in FSB after incorporation in the case of all *sijils* issued after 1 March 1979.

The sections of the Education Act above set out show that the certificate is issued not to an individual in his personal capacity but by virtue of his office ie, "to the person who **is to** act as chairman of the managers or to the person responsible for the management of the schools".

In this context it must be noted that s. 19 of the Education Act in England is very differently worded (see *15 Halsbury Statutes* (Fourth Edn) p. 124 which requires for the constitution of a body of governors and for a proportion of the governors to be foundation governors and the remainder to be appointed by the local education authority.

Our Act leaves the applicants free to decide how they should constitute themselves and whom they wish to appoint chairman. They chose to form themselves into a limited company with a succession of different chairman thereafter.

Thus Ahmad Roose was the first chairman from 1 September 1978 till 11 April 1983. On this date Dato' Ahmad Yunus became chairman. In 1984-1985 the chairman was Dr. Umasuthan Kaloo. From 1986-1989 the chairman was K.B.

Thuraisingham. From 13 March 1989 the chairman again became Ahmad Roose. On 26 February 1993 the registrar recordered Saw Teng Chuan as chairman, and as from 16 December 1993 the schools filed forms stating that KBT had taken over as Chairman. These particulars are taken from Mr. Sundram's statement in the court below (3rd vol Appeal Record pp. 913-914). The petitioners claim that Ahmad Roose was a "chairman" for life of the schools has no basis in reality.

As appear from Puan Arpah's affidavit the records of the registrar of schools shows the changes of chairmanship as follows:

1.9.1979	–	11.11.1980	–	Tn. Hj. Ahmad Rose Hj. Mohd Ali
13.12.1983	–	31.12.1988	–	Dato' Ahmad Yunus
1.1.1989	–	1.11.90	–	Tn. Hj. Ahmad Rose Hj. Mohd Ali
11.1993	–	31.12.1994	–	Encik John Saw Teng Chuan
19.5.1994	–	present day	–	Encik K.B. Thurai Singham

It is significant that the certificate numbers never changed. It is still 720, 721 and 722. The name is **not** Fairview Schools Association but Fairview Schools. Although the certificates (as late as 1991 (3rd vol Appeal Record p. 710) are headed Provisional Certificate of Registration under s. 48, they contain all the relevant details required to be included by s. 49. By the time the winding-up petition was filed on 25 August 1994 the registrar had already registered Saw Teng Chuan as chairman from 1 January 1993. When the petition was heard in mid 1996 the high court had evidence before it from the Ministry of Education that Ahmad Roose had ceased to be recorded as chairman on 31 December 1992.

Section 2 of the Education Act 1961 defines "schools" as:

> (a) a place where ten or more persons are or are habitually taught whether in one or more classes and includes a kindergarten, nursery schools and a training centre for teachers in kindergarten and nursery schools; ...
>
> but does not include any place where the teaching is of purely religious character or for a purely religious purpose or where the Registrar is satisfied that the teaching or instruction provided is not educational as envisaged in this Act;

As the relevant sections quoted make clear the provisional certificate is not a document of title evidencing presumptive ownership of property be it land or chattles real or personal. It merely records the fact that official recognition has been taken of the place where the designated activity is to be conducted

and identifies the person (the chairman) primarily responsible for ensuring that the designated activities are carried out in the manner prescribed by the Education Act.

Furthermore by s. 53 of this act the registration could be cancelled at anytime for the reasons stated therein.

One needs to be careful when asserting a claim to "the ownership of the permit" (or the certificate) in such circumstances. The evidence establishes that the provisional certificates *(sijil sementara)* were renewed each year terminating on 31 December. The renewal fee of RM2 was paid by FSB and the evidence of renewal is by way of a rubber stamp endorsed on the certificate with the particulars filled in. The certificates were issued to the Fairview Schools. It is not the ownership of the paper on which these details appear which is in issue here. By claiming ownership of the permits the G3 and Ahmad Roose in particular are saying that he owns the right to be issued this permit in his individual capacity presumably for as long as he wished to run an educational institution called Fairview Schools Association. In law the concept of ownership implies the right to use and enjoy property including the right to transmit it to others. But the renewal of the permit was an executive act, which cannot be the subject of a decree of specific performance (see s. 29 of the Government Proceedings Ordinance 1956 and *Lim Kit Siang v. U.E. (M) Bhd. and Others* [1981] 1 MLJ 35 at 27.

There is ample evidence to support the view that it was the efforts of the G3, their spouses and supporters which propelled the Fairview Schools to a viable educational institution. This was intended to be and was always run as a non-profit making body. The efforts aforesaid may well have gone beyond the call of duty. The tenth anniversary of the schools was celebrated in 1989. The messages from G3 who were respected as the schools' founders is testimony of their invaluable contributions to the growth of an institution which in microcosm, symbolised Malaysia at its radiant. The poem which accompanied the message of Mrs. Rosie Low the Supervisor of the Junior School describes the spirit which then prevailed. It bears repetition here for posterity:

> There is a gift I'd like to give you
> That can't be bought or sold
> A ray of sunshine across the waters
> That comes straight from the soul.
>
> Let us join our hands together
> To bind the colours of our skin
> A rainbow under God's great heaven
> A sign that love will always win

Ten (One) one thousand million smiles
I bring to you across the miles
In my land of sunshine
Or in your land of snow
Makes no difference where you are
If you let your feelings show
Ten (one) thousand millions ways
To love each other every day
For the poet and the old man
For the mother and the child
These ten (One) thousand millions smiles

If the world is full of sorrow
Then what's the meaning of life
If war's the master of the house
And hunger is his wife, o o

But a shining bridge of loving smiles
And tender helping hands
Will bind all men on earth together
And will forever stand

So here I stand with heart in hand
I bring this gift from my homeland
So take these smiles and sweet hellos
Keep them in your heart where ever you may go

By 31 August 1991 FSB's turnover was RM1,140,594. Its fixed assets were valued at RM1,159,338. Being an international school the parents were of necessity a transient population. A total of 463 lots of 50 shares each had been issued, but about two thirds of the parent shareholders had left without a forwarding address. At some point the practice of making the parents of incoming children shareholders as a matter of course was discontinued. However all parents had to make deposits by way of security for fees. Since, in theory these were refundable, the parents were shown in FSB's books as creditors.

During the earlier tenure of KBT's chairmanship from 1986-1989 FSB had bought a piece of land at Bukit Belacan comprised in Lot No. 1223 Mukim of Ampang intending to put up its own school building. Thereafter when Ahmad Roose became Chairman once more it was decided at an E.G.M. of FSB on 19 August 1991 that this land was unsuitable for a school building and should be sold at a loss of about RM200,000 for RM520,000, and the funds used to buy another piece of land.

The schools were then being carried on in rented premises at 317 Jalan Ampang and the landlord had given notice of intention to terminate the tenancy. At another E.G.M. on 18 December 1991 Ahmad Roose announced that owing to the need to expand and the huge capital costs involved it was no longer possible to confine FSB's shareholdings on a non-profit basis but to consider the schools on a commercial basis with dividends being declared to the existing shareholders out of the profits of the company.

At this meeting the following resolutions were unanimously adopted viz:

(i) to increase the authorised capital of FSB from RM50,000 to RM5 million;

(ii) to amend the M & A of FSB accordingly;

(iii) subject to the approval of the C.I.C. and other authorities to issue 2 million shares in FSB to the shareholders registered in FSB's books as at 20 November 1991 in the proportion of 86 new shares for each share held and shares not taken up be dealt with as the Directors thought fit;

(iv) to issue shares to persons other than parents of children in FSB;

(v) and most importantly to purchase a 3.5 acre site at Bandar Wangsa Maju from PGK Sdn. Bhd. for RM2,332,638 and to obtain the necessary loan for the purpose.

On 18 March 1992 FSB entered into a formal written agreement to buy this land. Datuk Bandar Kuala Lumpur held a lease over the entire area of 27.28 acres for 99 years to be developed into a new township. PGK had been given the right to develop the said area of which 152,460 square feet (the said lot) had been set aside for an educational institution. It is this lot which FSB agreed to buy from PGK for RM2,334,162, by paying 10% down payment on 18 March 1992 and agreeing to make further payments of 40% of the purchase price on completion of the earthworks another 40% or completion of the infrastructure facilities and a final 10% on delivery of the transfer. For the present purposes it is not necessary to set out all the provisions of this sale agreement. Suffice to say that to meet the down payment Ahmad Roose and his board utilised the cash reserves of FSB which was then on fixed deposit. It is not clear what they did with the RM520,000 for the Bukit Belacan land, if they received full payment for it. What is clear is that Ahmad Roose and his Board thought they could raise the balance required by loans from financial institutions. The first 40% or RM933,664.80 had to be paid by 31 March 1992. Failure meant the vendor could forfeit the deposit and terminate the agreement (3rd vol Appeal Record p. 734). By the time of the EGM of 15 June 1992

FSB was facing a financial crisis because all measures to raise the loan had failed and consideration was therefore given to getting an extension for as long as possible and taking alternative measures to raise RM7.5 million to build the new schools.

Further alternatives were explored and placed for consideration before another EGM on 28 July 1992. The meeting unanimously authorised the board to proceed to negotiate a joint venture or loan with Bitaria Sdn. Bhd. or Datin May Lee and also resolved to increase the school fee refundable deposit to RM3,000 per child towards financing the cost of the construction of the new school. A comprehensive financial report dated 27 July 1992 (3rd vol Appeal Record p. 739) had been circulated to all concerned about the implications of these proposals. The need for funds had become desperate because the deadline for avoiding forfeiture of FSB's deposit and the termination of the agreement with PGK Sdn. Bhd. was 31 July 1992.

That very day the Ahmad Roose board executed a formal loan agreement with Bitaria Sdn. Bhd. (the said loan agreement). Bitaria agreed to lend RM2,100,745 to FSB, to complete the purchase of the said lot. As security FSB executed an absolute assignment of all its rights against PGK Sdn. Bhd. and the Datuk Bandar Kuala Lumpur under the sale agreement. FSB undertook to complete its rights issue with a limited time, and Bitaria was given the option of either compelling repayment of its loan in cash, or to convert the whole or any part of its loan to shares in FSB provided in that event Bitaria was to hold not less than 30% of the entire share capital of FSB. Bitaria also had the option of taking up all shares allotted and not taken up by the shareholders of FSB. If this was less than 30% of FSB's share capital then the FSB Board was obliged to allot the entire shortfall to Bitaria. Bitaria borrowed their loan moneys from its bankers. As from 30 July 1992 FSB took upon itself a liability to repay the loan with interest at 2% over Bitaria's bank's rates of interest. FSB was the legal owner of the said lot but having assigned all its rights and also executed a charge in escrow, FSB agreed that its right to occupying the said lot would be as Bitaria's licensee only.

Obviously the financial problems of FSB were a continuing nightmare because a further EGM was convened for 11 November 1992 when the Ahmad Roose's Board tabled a resolution that schools fees be increased by 30%. This was the only resolution tabled for that day.

Now art. 66 of FSB's M & A provided that all business transacted at an EGM shall be deemed special. And art. 61 required the notice given of any general meeting to state *inter alia* "in case of special business the general nature of the business."

Once the meeting got under way and Ahmad Roose explained the need for the increase in the schools fees, KBT launched a vehement attack on the board for selling the Bukit Belacan land. KBT said that when KBT had left the board this land had been put in a state of readiness for the new schools building including the financing thereof. The purchase of the Wangsa Maju land was also attacked as was the agreement with Bitaria. KBT's faction had not given any prior notice of their intention to discuss this or any other business.

After this onslaught KBT moved a vote of no confidence in the incumbent Board. This was supported by a majority voice vote. As Sundram says the incumbent Board were "booed out".

Had the chairman ruled that such a motion of no confidence was out of order since no advance notice had been given, its propriety would have become an issue which required to be judicially decided. (See *Gower* pp. 532, 533 and *Re Hampshire Land Co.* [1896] 2 Ch. 743 referred at note 46).

But the matter became a non-issue because immediately after this Ahmad Roose "declared that he quit the company and walked away. The other directors left their seats or were reluctant to continue with the meeting". (See the minutes (3rd vol Appeal Record p. 626). The secretary agreed the meeting had not been adjourned. To continue with the meeting KBT was nominated chairman. This was put to the vote. 46 voted in favour. 4 abstained. Nobody voted against. Article 69 provides that the members present may choose one of themselves to be chairman if all the directors present decline to take the chair. The main resolution regarding the increase in the school fees by 20% was put to the vote and carried.

Dr. Yahya Sofie had tendered his resignation as board member during the meeting. Article 91 provided for the directors to fill a casual vacancy. The minutes here read that the members present at this meeting "re-appointed" Praba Menon and Dhaliwal as board directors. As can be seen from the petition these two individuals were lawfully appointed directors and the term "reappoint" can only mean that the meeting recognised that they were not the subject of the no-confidence move. KBT vacated the chair which was then taken by Praba Menon. Eight persons including John Saw were then contingently appointed to fill up further vacancies on the board should the other incumbents decide to retire.

Mr. Sundram's notice of his intention to withdraw the schools' licence was noted in the minutes (3rd vol Appeal Record p. 62).

The next board meeting of FSB was held on 17 November 1992. Four directors of the board as it was constituted on 11 November 1992 and lawfully there by virtue of their election at the previous AGM were present ie, Praba Menon, J.S. Dhaliwal, R. Thiagarajah and Dr. Asraf Osman Kothawala (3rd vol Appeal Record p. 644). FSB's secretaries informed the board that between 11 and 17 November 1992 Ahmad Roose, Mohmad Kamar, Dr. Yahya, Dato' Seng, Encik Sivananthiran and Dr. Malik had tendered their resignation. The petitioners complain that no previous notice was given to the directors of this meeting. But the fact is that all the directors were there except Sundram, and those who resigned. Article 113(c) provides that a director vacates office upon resignation. Article 65 provides that non-receipt of notice shall not invalidate any meeting. By art. 88 unless othenwise determined by a general meeting the number of directors was not to exceed seven. The petitioners say that as on 10 November 1992 the number had been increased to eleven (1st vol Appeal Record p. 79) (the old board). Four of them were present. As empowered by art. 91 they appointed six persons to succeed the six who had resigned. One of these was John Saw. Another was Daniel Chian Ngook For. According the minutes (3rd vol Appeal Record p. 646 para 147.01) he said something which resulted in all the four directors aforesaid of the old board resigning then and there. The result was that the six new appointees now took control and John Saw Teng Chuan (without any formal minute to that effect) assumed control as chairman of FSB. They are referred to hereafter as the **new board**. Apparently they felt that Mr. Sundram should resign too.

That John Saw acted as chairman on 17 November with the acquiescence of the new board is clear because as from 18 November 1992 he signed the minutes as chairman. Mr. Selva seems to have given way as secretary to Koh Tuck Kean. Sundram refused to vacate, and Sivananthiran's alleged resignation between 11 November and 17 November was repudiated. The new board gave notice on 10 February 1993 for an EGM to be held on 7 March 1993 at 3pm to remove them with immediate effect. The same day the new board gave notice of the 13th AGM of FSB on 7 March 1993 at 4pm.

When the EGM was convened on 7 March 1993 Mr. Sundram and several others sought to challenge it on the ground that the requisite notice had not been given as required by law. They did not get a sympathetic hearing. Mr. Saw who was in the chair overruled the objections. His attitude (and that of KBT who took an active part in the proceedings) was that once a vote of no confidence had been passed every member of the old board must resign. There was then a dispute as to the validity of proxies. In the result both Sundram and Sivanathiran were voted off the board by 1,250 votes for and 650 votes against. Article 96 of FSB and s. 128 of the Companies Act 1965 permits

removal of directors by a simple majority. The AGM followed and John Saw and four others were re-elected as directors.

Ahmad Roose and the other members of the old Board as on 17 November 1992 resigned of their own free will. Sundram and Sivananthiran however were removed. After his resignation, Ahmad Roose wrote to FSB by letter dated 16 December 1992 that the permits were his (3rd vol Appeal Record p. 713). The letter is written to the chairman of FSB; a post Ahmad Roose vacated. He claimed the permits were in the name of Fairview Schools Association. (This is not correct. They were in the name "Sekolah Fairview") (3rd vol Appeal Record p. 706). Ahmad Roose wanted FSB to effect the renewal at its own expense but in his name. FSB did renew the permits but in the name of John Saw as chairman from 1 January 1993 to 31 December 1994, such renewals being effected on 18 April 1994 and 24 May 1994 (3rd vol Appeal Record pp. 707, 709 and 711).

Sivananthiran has not filed any action and we are not concerned with him. Not until 4 December 1993 ie, nearly a year after the meeting on 17 November 1992 and nearly seven months after his expulsion as board member did Sundram file his Civil Suit S4-22-594-93 (the Civil Suit). He named FSB, KBT, the company secretary and all the other new directors of FSB as defendants. In his statement of claim, Sundram:

(i) attacked the validity of the appointment of the directors at the meeting of 17 November 1992;

(ii) attacked the validity of the EGM convened on 7 March 1993 because the meeting had not been called by a resolution of the board and had not given 28 days notice;

(iii) claimed that he had not been given a fair opportunity to show cause why he should not have been removed;

(iv) relied on various other alleged transgressions arising out of the alleged wilful refusal of the company's officers to make proper disclosures to his queries.

In brief Sundram's prayer was for the meeting of 11 November 1992 and 7 March 1993 to be declared null and void, to be reinstated as the managing director of FSB and for the *status quo* to be restored. But declaratory relief is a discretionary remedy. The delays aforesaid were inimical to a speedy resolution. Perhaps the G3 felt they could enlist the aid of the relevant educational authorities to prevent the new board entrenching themselves. They now took some tentative steps to register themselves as Fairview Schools Association; (3rd vol Appeal Record p. 875) which was not proceeded with.

A defence was filed in the Civil Suit in December 1993. KBT filed an affidavit in support of an attempt to have the suit struck out under O. 18 r. 19 of the Rules of the High Court (RHC). What happened to this application has not been made known to us. Since the Civil Suit was fixed for a full trial on 8 February 1995, we infer that this application was either dismissed or not proceeded with.

Whilst all this was going on, the new board endeavoured to disentangle FSB from the arrangements made with Bitaria by finding other business allies to help restructure FSB's future plans. On 20 November 1993 Bitaria formally demanded repayment of the loan of RM2,100,745.80 plus accrued interest of RM249,601.51 (3rd vol Appeal Record p. 792). The new board approached the Bank of Commerce for a short term loan to pay off Bitaria. By March 1994 this loan had been approved in principle. In May 1994 KBT was reappointed to the new board as chairman. A battle of affidavits was then in progress in the Civil Suit. KBT filed an affidavit defending his actions at the meeting of 11 November 1992. He also sent a letter to all parents about the schools' finances. By 28 July 1994 the new board gave notice of an EGM on 28 August 1994 to remove Mr. David Kuok & Co. as auditors, and another EGM to increase the share capital of FSB from RM23,150 to RM4,023,150. Other resolutions were proposed at this second EGM which had far reaching implications on the structure of FSB, the composition of its board and the terms of its M & A. The big picture was that these resolutions were required to raise the necessary money to pay off Bitaria and make FSB viable financially. Kolej Damansara Utama (KDU) had been approached to take up the increased share capital required.

Had these proposals been put through, Bitaria and the G3 must have feared they would have been locked out of any further involvement with FSB. At this stage it must be emphasised that Sundram is not a shareholder in FSB. Nor is Ahmad Roose. The third member of G3 Dr. Malik is a shareholder. This winding-up petition was filed on 25 August 1994 with the avowed object of thwarting the objects of the meetings on 28 August 1994. But the petitioners' solicitors did not serve the petition until about 9 September 1994. All the resolutions were passed with the required majority.

This is a contributors' petition in name only. The petitioners' solicitors are the same firm who are acting for Sundram in the Civil Suit. In so far as the complaints relate to the events which took place at the meetings on 11 November 1992 and 7 March 1993 they were nearly two years late. Indeed Dr. Malik and Dr. Kothawala the third and sixth petitioners had resigned from the board by 17 November 1992. How can they now be heard to complain? The object of the exercise was however to detach the permits and the assets

of FSB and vest them in the G3 whilst at the same time saddling all the liabilities of FSB on the new board of directors who took control of FSB on and after 17 November 1992. The petitioners applied for an interim injunction which was only withheld pending arguments because Mr. Davidson gave an undertaking not to implement them. The injunction eventually was granted on 23 January 1995.

The petition had a catastrophic effect on FSB. The Bank of Commerce withdrew its offer of finance. All plans for expansions and resolving the financial problems of the schools had to be put on hold. After some further delays arising from appeals against interlocutory orders refusing leave to cross-examine the deponents of affidavits filed, the winding-up petition eventually came on for hearing on 9 March 1996 and various dates thereafter. Written submissions were filed and the High Court judge ordered the company to be wound-up on 20 November 1996.

The Civil Suit is yet to be heard. In late 1995 the G3 filed Originating Motion R1 25-9-95 in the High Court at Kuala Lumpur against the Chief Registrar of Schools and the Ministry of Education for a mandamus seeking the court's intervention to compel the authorities to invalidate the permits granted to the Fairview Schools under the Chairmanship of John Saw and then KBT and to issue them to Ahmad Roose instead. Once again they were represented by the same firm of solicitors. This motion has been part heard. Both the Civil Suit and the Motion have been adjourned pending the decision in this appeal.

One further point to note is a sharp divergence of views between Ahmad Roose and Sundram about the extent of their claims to ownership of FSB's assets. Having taken a prominent role in this petition by filing a very contentious affidavit deposed to on 20 January 1995 Ahmad Roose failed to appear at the hearing on 10 May 1996 for cross-examination. Despite an adjournment to 15 May 1996 specifically to procure his attendance, Ahmad Roose still did not turn up. By then his writ of mandamus was pending in another court. For what it is worth his affidavit contains, *inter alia*, the following averments:

> (i) 16(i). I affirm that I was not a shareholder of the company by choice. Although all parents were required to become shareholders, I chose not to become one since my wife, Hashimah bt. (Tun) Abdul Aziz (one of the petitioners) is not only a shareholder but also a subscriber to the Articles and Memorandum of Association of the company. Further, she was also the first principal of the School. The necessity for me to become a share holder thus did not arise.

(ii) 26. As affirmed above, the schools and the respondent are separate entities. Consequently, the winding up of the respondent cannot automatically result in the closure of the School as well. This is so because the permit to operate the School is not an "asset" owned by the company. Thus when the order to wind up the company is issued by the court, it does not follow that the court would *ipso facto* issue an order to close down the School. I verily believe the power to do so is vested in the Minister of Education alone. The court may, however, concomitantly chose to issue a separate order to Ahmad Roose as Chairman of the Association and his Committee to take immediate steps to ensure that the School shall continue to function. In this connection I do hereby affirm that I shall take all the relevant steps to ensure that the School shall continue to remain in operation when the respondent is ordered to be closed down.

(iii) 27. The contention that "the land and all the assets" (presumably together with all the liabilities) belonging to the company "are returned to the founders" is not only absurd but also infantile. The petitioners are certainly not ignoramus of the Companies Act 1965 that they would care to a such an assumption.

(iv) 32. One of the many contentions of the respondents counsel is that the School's permit is not owned by Ahmad Roose or the Committee. This is not disputed because the Ministry of education is the sole owner of the permit it granted to the Association. Further, the Ministry is the only authority vested with the power not only to issue the permit but also to cancel, withdraw, transfer, change or modify the terms of the permit given to the Association. Nevertheless, it is a fact that the Ministry has not exercised its power to transfer or cancel the permit issued to the Association. Please see Appendix "B" which was issued exactly 10 years later after the original approval was given! Thus, it is clear that the permit was given to the Association. Further it may also be concluded that the question of whether or not the Association was in existence or officially registered at the time (in 1978 or ten years later in 1988) was of no significance to the Ministry of Education.

Appendix "B" (3rd vol Appeal Record p. 862) is not to Fairview Schools Association but to the chairman Fairview Schools and concern the maximum number of pupils permitted

As pointed out earlier after Ahmad Roose informed the Ministry that the name of Fairview Schools Association was not acceptable to the registrar of companies the permits were issued not to Fairview Schools Association but 'Fairview Schools". Ahmad Roose's claim in his affidavit aforesaid was only to the permit, and not to the assets and liabilities of FSB. Sundram however claimed in the court below that the G3 owned the Fairview Schools and also owned the right to operate the schools. (See *Creditors' Statement* (2nd vol

Appeal Record p. 547 para 1.4.2). He could not however produce any documentary evidence to show that the G3 had put any money into it. After repeatedly stating in cross-examination that he claimed ownership of all FSB's assets the trial judge himself interceded with the question and Sundram gave the answered recorded as follows:

> Court:
>
> Is it your case as explained yesterday on questioning by Mr. Davidson that the respondent are holding the assets of the schools including the land, as trustee for you, Ahmad Roose and Dr. Malik as beneficial owners?
>
> **Mr. Sundram:**
>
> A: Yes

Before we turn to the other issues arising in this appeal it would be in the best interests of all concerned to highlight the rejection by the trial judge of the petitioners' attempt to bolster their case by relying on the ground that FSB was unable to pay its debts. Section 218(1)(e) of the Act was never pleaded or relied upon in the petition. The petition itself was never amended to rely upon this ground. None of the other "creditors" had applied to support the petition except Sundram. His claim was disputed in the Civil Suit and therefore was not a debt FSB was legally liable to pay. We entirely agree with the trial judge's observations for rejecting this ground (see [1977] 5 MLJ 267 at pp. 279-280). There is no cross appeal against this finding. The judge said at p. 280:

> The only supporting creditor is P.S. Sundram and his debt is opposed. However his motive seems to be to recover the schools for himself. Such a claim verges on absurdity.

The trial judge later went to to decide that the assets of FSB including the permits belonged to the "founder-members" of the school who were (or included) the Group of 3. With respect, if Sundram's claim to the assets and the permits verged on absurdity so should the claims of the so called "founder-members". There is a contradiction here which we are unable to reconcile. The lynch pin of the petitioners' case was that the permits, and the assets of the schools belonged to G3. Even though Ahmad Roose was not named as a party to the petition he nevertheless fully embroiled himself in these proceedings. This judgment must therefore be equally binding upon the G3 as much as the petitioners themselves. *Nana Offori Atta II v. Nana Abu Bousra II* [1957] 3 WLR 830 and *Thadium Sdn. Bhd. v. Zain Azahari bin Zainal Abidin & Anor* [1995] 2 MLJ 668 refers. In dismissing the claim to wind-up under s. 218(1)(e) the trial judge also took into account the wishes of the 57 shareholders and 98 creditors who opposed the petition. Sadly he failed to take

a their views into account when dealing with the other grounds on which he proceeded to order the winding-up.

Who Owned The Permits And The Schools?

In his prologue to the petition (see [1997] 5 MLJ 272, 273) the trial judge b overlooked the critical fact that the first application to the Ministry was **NOT** made by the Group of 3 in their individual capacity but as agents for the entire group of individuals who constituted the Parent-Teacher Association of the Garden School. Whilst the role of G3 as the prime movers of the new schools must be acknowledged the facts we have earlier spelt out and the minutes of c 22 November 1978 make it crystal clear that the G3 (or founders if they must be so called) were not a power unto themselves but only a pro-tem committee on behalf of all the individuals who lent their support to the idea of forming the new company. The trial Judge's finding that the purchase value of the share was a refundable deposit is a misdirection in law and fact. Share capital cannot d be refunded by the company to a shareholder to pay for shares returned. This is illegal (see art. 8 and s. 67 of the Companies Act 1965). The only way to achieve this is for the company to go through a restructuring exercise for reduction of capital (see *Gower (ibid)* p. 683, *Pennington* p. 172 and s. 64 of the Companies Act 1965). As the minutes of 22 November 1978 show the e deposit which was refundable was the deposit made as security for fees which was to go into a separate account. So far as the company called FSB was concerned the trial judge overlooked the sequence of events which proved that the vehicle intended although initially called "Fairview Schools Association" was not an association at all in the sense of a "society" but a proposed public company limited by guarantee and hence Fairview Schools Berhad. We will f come to the legal implications of the events on 11 November 1992, 7 March 1993 and 28 August 1994 later. Having narrated this history the trial judge said this at p. 275:

> It is my finding that the permit holders had never handed over the ownership g of the permits to the respondent. The Ministry had required the schools to be run on a non-profit basis. The attempted conversion of the Schools to a profit earning business required the Ministry's approval and such approval if any no doubt can be obtained only by the permit holders. No such clearance had been shown to have been obtained.

h With the greatest respect to the trial judge, we think this finding is unsupported by any judicial reasoning and also flies completely in the face of facts and the applicable law. In all the circumstances of this case it is a misconception to talk about "ownership" of the permits. The provisional certificates as earlier spelt out was the prerogative of the Ministry. They were issued not to any i individual in his personal capacity but initially to the applicant ie, Fairview

Schools Association (a company limited by guarantee) a.k.a. Fairview Schools Berhad as from 1 March 1979. The names of Ahmad Roose and the various other individuals who succeeded him were not inserted in the licence to show ownership but to indicate the identity of the person who by virtue of his office as *pengerusi* was charged with the responsibility of carrying out the requirements of Education Act. A careful reading of the correspondence which led to the issue of the *sijils* and the *sijils* themselves will show that it was the applicants who had mooted the idea of running the schools on a non-profit basis as a reason why their application should be considered. Nowhere in the Ministry's letter or in the *sijils* was a **condition** imposed that the schools should not make a profit. This was an obligation which had been voluntarily assumed by all the persons who were concerned in promoting this company and running it after it was incorporated.

In holding that Fairview Schools Berhad was a domestic company, the trial judge once again misdirected himself by holding that there was a restriction on the transfer of shares. With respect arts. 26 to 38 of the M & A places no such restriction. Article 30 provided that the directors could in their discretion refuse to register any transfer without assigning any reason therefore. FSB is a public company and such restrictions will be very jealously regarded by the courts (Pennington @ 342 and Gower at p. 445). Whatever was discussed at the meeting of 22 November 1978 was superseded by the Memorandum and Articles of Association of FSB. We are therefore unable to attach any esoteric significance in describing FSB as a "domestic company".

However the trial judge, again with the greatest respect, made another leap in judicial reasoning by holding that because this was a domestic company its shareholders had no right to the assets of FSB but only to participate in overseeing and managing the schools. He said:

> **Respondent, A Domestic Company**
>
> In the light of the background facts it is my finding that the respondent cannot therefore be viewed as an ordinary company. I hold that it is a domestic company with restriction on the transfer of shares and the share capital is treated as a refundable deposit to the shareholders on demand at the par value of RM50 only, upon their children ceasing to be educated at the schools regardless of the value to schools' assets.
>
> The shareholding of RM50 merely entitles the parent shareholder to participate in overseeing the affairs of the schools, which were and have always been run by a principal, and teachers registered with the Ministry of Education. It is my judgment that for all intents and purposes there remains a clear distinction between overseeing the management of the schools and ownership of their certificates of registration which gives right to operate the schools, and the

assets. Since its inception the respondent did not at all inject any funds towards the operational costs of the schools. The assets of the schools, including any accretion thereto, were the result of the initial investment by the founder-members.

Respondent, A Trustee

I find that the respondent, as the overseer, was entrusted *inter alia* with the management of the schools' funds and all other assets and all accounts were made up in its name. It is my finding that the respondent therefore stands in law in the position of at trustee *vis-a-vis,* the founder-members. It is a fact that neither the certificates of registration nor the assets of the schools were ever transferred by the founders to the respondent for any consideration whatsoever. It is also a fact neither Ahmad Roose nor any other holder of the certificate ever applied to the Ministry of Education to effect a change of name in the certificates of registration from himself to the respondent."

The trial judge thus totally overlooked the significance of Ahmad Roose's letter to the Ministry dated 1 March 1979. He also failed to appreciate that FSB's only assets came from the money put into this company by its shareholders as capital and by the parents as fees and refundable deposits. So far as the G3 is concerned their efforts prior to incorporation, is shown in the audited accounts as a deficit. The trial Judge's observation that FSB did not inject any funds into the operational costs of the schools suggests a lapse of memory of the basic principles of Company Law. Earlier in this judgment we have already spelt out the legal role of promoters as trustees of all assets and rights they acquire for the company in the course of formation. Now let it be categorically stated that everything that is put into a company's name upon incorporation belongs to the company and to the company alone in the absence of reservation in the clearest terms in the M & A or in a formal contract executed after incorporation with the full knowledge and consent of **ALL** the shareholders. In all the circumstances of this case the finding that FSB was a trustee for the founder-members cannot stand scrutiny. We are not sure whether by "founder-members" the trial judge had in mind the G3 or all the people who participated in the meeting of 22 November 1978. The drift of his judgment suggests he meant only the G3, at least when talking of the permits. When it came to all the assets there is a possibility that he had in mind everybody who made payments for shares and deposits at or about the time of incorporation. Far from FSB being a trustee for this amorphous class of beneficiaries we hold that the reverse is the case in so far as those who promoted FSB were trustees for the company which in this case became the sole beneficiary of all its assets.

Indeed the contemporaneous available documentation in this case conclusively shows that this was also the intention of the G3. Limited companies are formed so that its shareholders are not exposed to unlimited liability for the company's debts. In exchange for this immunity, share capital is pumped into the company which thus becomes available to the company's creditors. We have Ahmad Roose's written words to the Bank in 1978 that FSB was the beneficiary of the moneys put into its account, not as the agent or trustee of the G3. The trial judge's observation that the founders did not transfer the assets of the schools to FSB for any consideration whatsoever is incomprehensible. Shares were issued, and security deposits were taken on condition that they be refunded. If the G3 thought the assets of FSB belonged to them, and the parent shareholders had no rights at all there would have no need to hold company meetings to obtain their sanction to deal with the assets in the company's books. The major decisions were the sale of the Bukit Belacan land and the purchase of the land at Wangsa Maju. The board paper of 27 July 1992 is a very telling document. It shows that the G3 and everybody else for that matter was under no illusion that FSB owned its assets in its own right. This passage taken from that report is significant:

> The Board willingly accepted the responsibility of finding such large amount of capital estimated at $5,750,000 as it was convinced that **with its own school, the future of FSB is assured** considering that the school would be fully furnished, fully equipped with essential teaching aids, the equipments for the 3 laboratories, a music room, a large hall, 2 libraries, audio visual rooms etc. The cost also include professional fees and all other charges.

Very formal contracts were executed by FSB with PGK and then with Bitaria in which there are recitals that the land was to be purchased with FSB's assets and the beneficial ownership was also FSB. The Bukit Belacan land and the Wangsa Maju land were the biggest assets of FSB. It was not even hinted at the time, that the G3 had any claim to them The trial judge's reliance on *Re Vandervell's Trusts* [1974] 1 All ER 47 was thus totally misplaced. It does not seem to have occurred to the trial judge that if in fact FSB was only an agent or trustee for the Group of 3 in contracting with PGK Sdn. Bhd. and Bitaria, FSB may well have had no contractual rights to sue or be sued on those contracts by virtue of s. 183 of the Contracts Act 1950. It is hard to believe that the Group of 3 even dreamed that the financial obligation to pay PGK or repay the loan to Bitaria was their personal liability, and Bitaria could now sue them for the loan!!

The first time Ahmad Roose claimed proprietorship of the schools' permit was on 16 December 1992. Sundram did not claim ownership of the schools and its assets in his statement of claim in his Civil Suit. In para. 2 of his statement of claim he merely said:

> 2. At all material times the 1st defendant was formed to oversee the management of the school on behalf of the Fairview School Association (the Association) who is the permit-holder thereof.

The defence to this reads:

> 2. Save and except that the said defendants admit that the 1st defendant was formed to oversee the management of the school para. 2 of the statement of claim is denied.

Sundram's claim that FSA was the permit holder or that FSB was formed to oversee the management **on behalf** of FSA was put in issue from the very outset of this litigation.

Having held that FSB was only a trustee of all its assets the trial judge went further to hold that for FSB to claim it was a beneficial owner would nullify the restriction on the transfer of shares and also amount to a fraud on those shareholders who had redeemed their shares at RM50. Once again it is very difficult to understand this reasoning which is not only speculative but based on unsound premises. As at 31 January 1997 the accrued interest claimed by Bitaria was RM848,636.27 making a total debt of RM2,949,382.07. This debt to Bitaria was the creation of Ahmad Roose Board and the estimate of the market value of the Wangsa Maju land was pure speculation. Having purportedly vested FSB's assets in the founder-members, the trial judge appears to have left these liabilities out of his calculations without giving any reason for doing so.

Winding-up Under s. 218(1)(f)

KBT was the prime mover in the purchase of the Bukit Belacan land. He said that when he left the board all the necessary arrangements had been in place to put the new school building on that site. This included finance.

By 11 November 1992 what Ahmad Roose and his board had done was to abort the project to build a school there and sell the Bukit Belacan land at a loss of RM200,000. It had also used up almost the entire cash reserves of FSB to pay for the deposit for the Wangsa Maju land and committed itself to pay the balance of over RM2 million within a stipulated time without having the necessary funds in hand. Bitaria literally had to bail out FSB by the skin of its teeth.

Obviously there was a lot of hostility on the part of KBT and his supporters to the actions of Ahmad Roose and his supporters whose voluntary resignations from the board tell their own story. The challenge facing the new board was essentially the same as the one facing the old – how to raise enough capital to pay off Bitaria and build the school on the Wangsa Maju land.

The trial judge has spelt out the various acts of the new board up to 28 August 1994. We do not need to go over this ground again. The crucial question was this. Did KBT and the other directors on the new board act in their own personal interest or did they act in a manner **they** thought was for the benefit of FSB and its shareholders?

In this context there is not a shred of evidence that KBT or any member of the new board made any secret profit or stood to make any personal gain by going into an arrangement with KDU.

As Mr. Davidson was at pains to observe that he did not hold any brief for KBT. He was acting for the company. Serious differences of opinion between two groups of shareholders about how a crisis facing the company should be resolved may be the source of litigation between them. It should not by itself be a ground for winding-up the company!! Even if the appointments of some or all the directors of the new board was allegedly defective the trial judge should have given due weight to art. 119 of FSB which directs all such acts be valid if done *bona fide*.

This was a contributors' petition. As against the six petitioners and Mr. Sundram, there were 57 shareholders and 98 creditors who were opposed to the petition. They did not think the new board had acted in their own personal interest. They thought the new board acted *bona fide*. In any event they did not want the company wound-up. There was a serious misdirection on the part of the trial judge when he totally failed to take their views into account under this head or the just and equitable ground. Besides he should have taken note that as the resolutions passed on 28 August 1994 were special resolutions, these proposals must have had the support of at least 75% of the shareholders present and voting. The petitioners' case under s. 218(1)(f) was thus a non-starter.

Winding-up s. 218(1)(i) "Just And Equitable"

The trial judge held the new board's *"agitprop"* was that if FSB was wound-up the schools would close down. *"Agitprop"* according to the Concise Oxford Dictionary means the dissemination of communist political propaganda. The use of the word here is puzzling. The finding that FSB alone was the beneficial owner of all its assets must negative any suggestion that there was a quasi partnership relation in existence here. The shares issued were in no sense a refundable deposit for reasons already explained. The reliance on *Ebrahimi v. Westbourne Galleries Ltd. & Others* [1972] 2 All ER 492 and *In re Yenidje Tobacco Company Limited* [1916] 2 Ch. D 426 was therefore misplaced. Those cases concern situations in private companies where the shareholders stand in relation towards each other in the same way as partners do who get into a

deadlock in the administration of the firm's affairs. In the present case FSB was the sole owner of all the company's assets, and there was no express or implied partnership between the G3 and the other parent shareholders before incorporation or afterwards. All FSB resolutions were passed with the majority of votes prescribed by the M & A and the Companies Act 1965. There is therefore no analogy between this case and the two quasi partnership decisions aforesaid.

A court cannot in pursuit of what it considers fair ignore the agreements between the parties. These are reflected in the documentary evidence and the M & A of FSB. Warner J made this point in *Re JE Cade & Son Ltd* [1992] BCLC 213 at 227 where he said:

> Mr. Collins submitted that that 'reversed the thrust' of earlier cases such as *Re a company* (No 004377 of 1986) [1987] BCLC 94, [1987] 1 WLR 102 (sometimes knows as *Re XYZ Ltd*) and *Re Castleburn Ltd* [1991] BCLC 89 and showed that in this field there was no sanctity of contract and that the court could in the pursuit of fairness ignore any agreement between the parties.
>
> I do not think that Balcombe LJ was intending to lay down any such wide proposition. What he said in the last passage that I have read was based on the fact that in the Westbourne Galleries case the House of Lords had held that, on a petition for winding up on the just and equitable ground, equitable considerations might override the legal rights and obligations conferred or imposed on the shareholders by the constitutions of the company, including of course its articles. Balcombe LJ did not say, and cannot be taken to have meant to say, that, where such equitable considerations arise from agreements or understanding between the shareholders dehors the constitution of the company, the court is free to superimpose on the rights, expectations and obligations springing from those agreements or understandings further rights and obligations arising from its own concept of fairness. There can in my judgment be no such third tier of rights and obligations. The court, exercising its jurisdiction to wind up a company on the just and equitable ground or the jurisdiction conferred on it by ss. 459 and 461, has a very wide discretion, but it does not sit under a palm tree.

The trial judge was very critical of the conduct of KBT's faction on 11 and 17 November 1992 and again 7 March 1993. These matters were already the subject matter of the Civil Suit in which Sundram was the **LONE** complainant. When the trial judge took into account the matters scheduled for E.G.M. on 28 August 1994 to decide whether it was just and equitable to wind-up he was influenced by his assumptions:

(i) that the schools and its assets belong to the founder-members;

(ii) that the sole reason for FSB's existence was that it should oversee and manage the property of its owners (ie, the G3 and the founder-members);

(iii) that by organising a sale of the school and its assets to KDU the new Board was in effect bringing to an end the very objective and purpose of FSB's existence;

(iv) that the new Board had an equitable obligation not to bring about such a situation.

Enough has been said to show that the correct view and the only view possible on the issue of ownership was that FSB owned all the assets in its name and correspondingly was saddled with all its liabilities from the salaries to be paid up to the teachers right up to the enormous loan and interest to Bitaria which was now hanging over its head like the veritable sword of Damocles. In exploring ways and means of preserving the company as a going concern, the new Board far from terminating the company's prime objective, was seeking to perpetuate its existence. In such a context it would be salutary to remember that a "a school" is only a location. The corporate personality of FSB consisted of the human and material resources involved, and to keep the classes and teachers going with a roof over their heads millions of Ringgit had to be found.

In delving into the events connected with the meetings on 28 August 1994 there were further misdirections in the court below both as to facts and law. On 28 July 1994 the secretaries issued notice of an EGM on 28 August 1994 at 1pm. This was for the proposed removal of the auditors (3rd vol Appeal Record p. 678). On 2 August 1994 the secretaries issued another notice for an EGM also 28 August 1994 but at 1.30pm (3rd vol Appeal Record p. 680). This was for the increase in the share capital and amendment of the Articles of Association. Also on 2 August 1994 the secretaries issued the notice for the AGM at 4.30pm on 28 August 1994 (3rd vol Appeal Record p. 685).

Article 60 of FSB articles required twenty one days notice at the least for an AGM and any meeting called to pass a special resolution. The first petitioner's letter is dated 15 August 1994. Even assuming it was posted on that day (there is no proof of any posting at all) it was too late for the secretary to include it for discussion 13 days later. The second letter by Mohd. Kamar bin Mohamad also dealt with the election of directors and some new business. Being dated 18 August it was also too late to be tabled for 28 August 1994. Mohd. Kamar is not a party and did not appear to oppose the petition.

It seems to have escaped the trial judge's attention that even though this petition is dated 25 August 1994 it was only served together with an application for an injunction on FSB on 9 September 1994 **AFTER** the meetings had taken place. As earlier observed the special resolutions must have been passed with the requisite three quarter majority.

There are no official minutes of the meetings on 28 August 1994 in the Appeal Record. The effect of the service of the petition may have something to do with this. It must follow that the trial Judge's account of what transpired at the meetings on 28 August 1994 must have been extracted from the affidavits filed on the one hand by Mahalingam for the petitioners and on the other the respondents' directors, and secretary. Sundram did not file any affidavit. The other petitioners did not file any affidavits. But Mahalingam did not attend the meetings. He gave a proxy to one Madam Inake Roskam to attend on his behalf. His evidence is pure hearsay. She has not filed any affidavit. Since this was a case of oath against oath, the trial Judge's unequitable acceptance of Mahalingam's accusations that KBT conducted this meeting with sinister motives is very hard to comprehend.

Earlier in his judgment the trial judge had referred to the EGM to amend the articles and increase the share capital of FSB and to appoint a board of governors. He said that the board had achieved the passage of these resolutions by misleading the shareholders into believing that if the "amended resolutions" were not passed the schools would have to be closed in September 1994. He then went on to find that KBT's insistence on compliance with s. 149(1)(b) of the Companies Act 1965 was done in the directors' own interests because in the interests of fair play the meetings should have been postponed. In any case the trial judge held that s. 149(1)(b) did not invalidate a proxy which did not comply with s. 149(1)(b) and that the failure to adjourn the meeting of 28 August 1994 and "the denial of the proxy votes was an overall plan to pass the resolutions and thereby dispose of the properties".

These complaints were not made in the petition. By going into matters which are not pleaded issues become confused and a court can easily be misled into treating bare allegations as constituting evidence which could support an exercise in fact finding. That is one of the reasons for the time honoured rule set out in *7 Halsbury's Laws of England* (4th Edn) p. 607, Supreme Court Practice 1985 Note 20/3-4/1 at p. 33, *Mallal's Supreme Court Practice Note* 20/3/1 at p. 248, and *Sio Koon Lin v. SB Mehra* [1981] 1 MLJ 225. The failure to plead these complaints could not be made good by affidavit evidence: *United Malayan Banking Corporation v. Palm & Vegetable Oils* [1993] 1 MLJ 206 at 207.

What is more astonishing is that the petitioners did not make their complaints in the prescribed manner at the meetings of 28 August 1994. If they wanted an adjournment it was up to them to make a formal proposal so that a vote could be taken, and if carried to the meeting would have had to be adjourned. By art. 70 the chairman could only adjourn the meeting with the consent of the meeting and had to do so if directed by the meeting. It does not lie in the mouth of a court to say that KBT should have adjourned the meeting because the court thought it was a fair thing to do.

Turning now to the alleged failure of the secretary to reply to the belated letters of Indrani and Kamal, the proper response was that these letters were irrelevant. By art. 97(2) FSB could appoint any person to be a director either to fill a casual vacancy or as an additional director. According to the petition para. 5 there were places for 11 directors on the board. The Notice for 28 August 1994 only covered six places. If any shareholder wished to propose more they could have done so by giving due notice. They could even requisition a meeting if the board refused to convene one (see art. 58 and s. 144 of the Act).

With the greatest respect to the trial judge we cannot agree that an illegal practice can become legal by usage. Section 149(1)(b) of the Companies Act 1965 means what it says and must be complied with. If on previous occasions the shareholders were breaking the law out of ignorance that does not mean that they could continue to do so with impunity. So also the need for Dr. Gurcharan Singh and Encik Hamid to comply with s. 123(4) of the Companies Act 1965 which clearly stipulates that the statutory declaration **"shall"** be lodged **"BEFORE"** he is appointed. The trial judge found that these two persons were tricked out of an opportunity to stand for election. But neither of these gentlemen supported the petition nor complained about being required to comply with the law. The Act provides for penalties in the case of non-compliance. It was not right for the trial judge to hold that is just and equitable to penalise FSB because KBT did precisely what the law required him to do. We can see no evidence to suggest that he acted on that day out of any oblique motives. There is no evidence he benefited personally in any way. The resolutions tabled for decision at the meetings held on 28 August 1994 must have been passed by the requisite three quarter majority of the persons attending and voting. If the trial judge thought they were under any under illusions as to what they were voting for on that day, it is hard to understand why he should have continued to think in the same way when he gave judgment in November 1996 because by then they had solicitors and learned counsel representing them. When they came to court and opposed the petition they knew full well what was at stake.

Motive

Powerful authorities were cited to us to show that even if it could be held in law that the permits and the assets of FSB belonged to the G3 nevertheless the court must dismiss the petition since it had been shown that the purpose of the petition was for the "owners" to take the assets back for their own benefit and not for the benefit of the shareholders of the company as a whole.

Sundram's role in this petition is as an alleged creditor. Actually he is claiming ownership, as is Ahmad Roose. The way the case has been fought leads to the irresistible inference that the six petitioners with Mahalingam foremost are really fighting not so much for themselves but for the G3 to whom they say the permits and FSB's assets belong. A contributory's petition is a class action and must be brought on behalf of all the shareholders but these six are at war with all the other shareholders.

Re Chesterfield Catering Co. Ltd. [1976] 3 WLR 879 is the best case to show that the court will not allow such petitioners to succeed. For the record we have also noted *Pennington's Company Law* (5th Edn) 854, *Re a Company* [1983] BCLC 492 and the Malaysian cases of *Re Sin Lee Sang Sawmill Sdn. Bhd.* [1990] 1 MLJ 250 and *Re Lo Siong Fong* [1994] 2 MLJ 72.

Having found that the permit holder is not the Group of 3 but FSB company, and that FSB is not a trustee but the beneficial owner of all its assets we do not need to analyse these decisions in any detail.

Where outsiders are claiming that property registered in the name of a limited company is theirs, the proper route is to file a Civil Suit in detinue or conversion or even a declaration that the property is being held by the company in trust for the claimant. To utilise a few minority shareholders as willing Trojan ponies to destroy the corporate edifice through a winding-up petition is a misuse of the Court's process.

Suffice to say therefore that in so far as the petitioners have lent their assistance in filing this petition they did so for an improper purpose and the petition should have been dismissed on that ground also.

Again where two groups of shareholders are at war with each other on matters of company policy the proper way to resolve such disputes is by the democratic process of the majority vote. The Companies Act 1965 and the M & A of FSB contained inherent safeguards to achieve this. If the majority did not like what happened on 11 and 17 November 1992 they could have requisitioned a new meeting and voted the new board out. Significantly R. Thiagarajah a director on 11 November 1992 resigned before 17 March

1993. He has not appeared to support the petition. Dr. Malik the third petitioner and Asraf Othman Kothawala the seventh petitioner also resigned by 17 November 1992. The resolutions of 7 March 1993 were passed by a majority of 1,250 votes for and 650 votes against. So 1,900 votes were cast. (3rd Volume Appeal Report p. 670). Not until 3 August 1994 did Thiagarajah and Kothawala write to complain about the meeting of 17 November 1992. The crux of the matter is that this is a fight between six shareholders against the rest so that the company's assets can be taken away and effectively given to three persons of whom two are not even shareholders of the company. One of them Ahmad Roose even chose to absent himself from the cross-examination and should have forfeited any further claim for consideration.

Multiplicity Of Proceedings

The trial judge held that this contention was rejected once by YA Abdul Malek J (as he then was) in this same winding-up petition and once by YA Rahmah Hussain JC (as she was then was) in the Civil Suit. This finding must be based on a passage in the written submission of counsel for the petitioners which reads:

> Mr. P.S. Sundram is made a bogeyman in these proceedings which is equated with his civil suit and it is suggested that this constitute multiplicity of proceedings. This argument was rejected twice – in this winding-up court by Datuk Abdul Malek J (as he then was) and in the Civil Court by Rahmah JC (as she then was).

Mr. Davidson submitted to us that the multiplicity issue never came up before YA Abdul Malek or YA Rahmah Hussein ever. We gave counsel for the petitioners ample time to respond by putting in a written submission in which we found nothing to support his earlier assertion aforesaid to the trial judge.

What the Notes of Evidence indicate is that on 23 January 1995 YA Low Hop Bing dismissed an application by FSB to strike out this winding-up petition. The Civil Suit had then been fixed for hearing on 8 February 1995. This winding-up petition came up for hearing on 24 January 1995. Encik Yusuf Khan made an oral application for leave to cross-examine. It was resisted. YA Dato' Abdul Malek adjourned it to 7 February 1995 for decision and fixed 23 February 1995. He dismissed the application for cross-examination on 7 February 1995. In the interim the petitioners appealed. On 23 February 1995 Encik Yusuf Khan successfully applied to stay the winding-up proceedings pending his Appeal and postpone the petition until the appeal was disposed of.

How YA Puan Rahmah figures in this issue, if she did at all, has not been clarified at all by the petitioners' counsel.

As far as the court is concerned it would appear to be a salutory practice to insist in future that counsel produce a certified copy of the order if *res judicata* is being relied upon. The *res* was wide open here. On the material before us it has to be held that the the objection on the ground of multiplicity was well taken and the trial judge should have ruled in favour of FSB on this issue also.

There are other ramifications which arise out of this because:

(i) the "ownership" of the permits;

(ii) the "ownership" of the assets of FSB;

(iii) the alleged illegality of the meetings on 11 and 17 November 1992, 7 March 1993 and 28 August 1994

were all common questions of law and fact in all three proceedings. The real contest here is between the Group of 3 on the one side and FSB and the Educational authorities on the other. To the extent that the Group of 3 have fully embroiled themselves in the proceeding before us it must be held that issue estoppel will now apply to each of them on all matters which have been decided in this appeal.

The Stand Of The Official Receiver (OR)

The infirmities of the trial Judge's findings were exposed to the full light of day when the time came to enforce his orders.

On 27 November 1996 when FSB sought to obtain a stay of the winding-up order the trial judge refused but went on to say:

> I direct the OR to forthwith take over and issue all necessary cheques inclusive of payments and other outgoings of each month that has to be met. In this, the OR will be guided by the headmistress or authorised representative appointed by the headmistress.

In other words the schools were to be kept running for the benefit of its so called "owners" whilst the company was to be wound-up. Encouraged by this Sundram has filed claims far in excess of what is stated in his Civil Suit. These are claims by way of unliquidated damages for alleged wrongful dismissal. Bitaria in the meantime appears to have lost its lending licence but is the assignee of the Wangsa Maju land. As at 31 January 1997 Bitaria is owed RM2,100,745.80 as principal and RM848,636.27 interest.

The OR is very perplexed by the trial judge's orders and has posed the following questions to this court:

(i) If all the assets of FSB belong to the G3, who is to settle the company's liabilities?

(ii) Why was the OR required to run the schools if the assets belonged to the Group of 3 and the so called founder-members? The role of the OR has never been to run the business of third parties as a going concern so that they could come and take it over at some indefinite time

The OR submits that if FSB is to be wound-up the only consequential order the High Court could have made was that the schools (ie, the business) should be brought to an immediate halt and all the assets gathered in and the creditors paid off!

The OR further submits to this court that if it is held that the assets belong to FSB there is every reason why it should not be wound-up but should be permitted to continue because it appears to be functioning very well.

This was a petition under s. 218 of the Companies Act 1965. It was emphatically not a petition for relief from oppression under s. 181. Mr. Davidson cited *See Teow Guan & Ors. v. Kian Joo Holding Sdn. Bhd. & Ors.* [1995] 3 MLJ 598 to the trial judge and in particular the passage at p. 604 by YA Gopal Sri Ram JCA which clearly states the only final order under s. 221(1) of the Act is to direct a winding-up or dismiss the petition. The power to deal with the assets of the company is vested in the liquidator and not the court. The court's attempts to preserve the assets and the schools as a going concern so that it could be handed over to the G3 was therefore completely misconceived.

Regardless of the merits, the trial judge's orders for the costs of the petition to be paid by the directors who took over the board on 11 November 1993 were also misconceived. Courts should not make orders against persons who are not parties to the proceedings and who have not been heard why such orders should be made against them. It is not understood why if this order had any validity it would require a fresh action to be filed to recover such costs and what the cause of action in the fresh suit was going to be.

Conclusion

It follows from all this that the only order open is that this appeal is allowed and all the orders appealed against are set aside. The appellant's deposit by way of security for costs must be refunded.

The appellant must be paid its costs both here and in the court below. The appellant's solicitors are released from the undertaking they gave by way of security for the costs of this appeal.

In view of the complexity of this case we grant the appellant only a certificate for two counsel here and in the court below as required by O. 59 r. 19 of the RHC 1980.

For the avoidance of doubt it is here stated that the six petitioners and Sundram shall be jointly and severally liable for all the taxed costs ordered.

The six petitioners and Sundram shall also pay:

(i) the taxed costs of the OR here and in the court below and any costs thrown away in the winding-up proceedings which must now been aborted;

(ii) the taxed costs only in the court below of the contributors and creditors who opposed the petition. In this court they were not parties as such and we heard Raja Aziz as *amicus curiae* only. There will therefore be no order for any costs they have incurred in this appeal.

Epilogue

In the court below written submissions were put in by all parties by June 1996. Judgment was delivered on 20 November 1996. It is unfortunate that nobody appears to have noticed the judgment of this court in *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd.* [1996] 1 MLJ 611. In addition to what was said in *Re J.E. Cade & Sons Ltd (supra)* about the court not sitting "under a palm tree", our analysis of the entire line of cases following *Ebrahimi v. Westborne Galleries Ltd* at pp. 684-692 should have amply demonstrated the futility of the claims made by the petitioners and Sundram about the alleged ownership of the permits and the assets of FSB in the absence of the clearest stipulation to that effect in the articles of FSB or enforceable contracts made by FSB after its incorporation and with the knowledge of all its shareholders. *Re Blue Arrow plc* [1987] BCLC 585 was especially instructive because it concerns the founder of a company who was removed from her position as President when the company went public.

The dead end at which these protagonists have arrived should at the very least make them now realise that the adversarial system has serious limitations when it comes to long term solutions for dispute resolution. An overview of the causes and consequences of the present debacle may yet go some way in compelling them to reconsider how best to rehabilitate the company. For:

If the world is full of sorrow
Then what's the meaning of life
If war's the master of the house
And hunger is his wife, o o

We think it is a fair inference that the Bukit Belacan land was KBT's pet project. Its disposal at a loss of RM200,000; an inadquate explanation of how the RM520,000 realised from its sale was subsequently utilised; the commitment to buy the Wangsa Maju land for over RM2 million without any clear ideas as to how to finance the project; and the desperate measures which were resorted to at the last minute by putting FSB at the mercy of Bitaria may all have been good grounds for criticisms of the Ahmad Roose Board.

But nothing we have said in this judgment should be construed as meaning that this court wishes to encourage the kind of behaviour of KBT's faction on 11 November 1992 which led to the resignation *en masse* of Ahmad Roose and almost all members of his board.

The KBT's faction forgot that the Ahmad Roose Board had acted with the approval of the previous EGMs, and in good faith. Nobody has suggested that they had personally benefited from the transactions. Viewed through 1992 spectacles, the acts complained of may only have been an error of judgment. Worst of all the KBT's faction chose confrontation to consultation. The mutual hostility of the warring parties, for reasons not fully revealed and their entrenched positions have brought FSB into the morass in which it now is.

With all due deference to the trial judge, we feel that his distaste of the manner in which the KBT's faction conducted itself, and the Ahmad Roose faction overreacted, contributed in no small measure to the errors of law and fact which crept into his judgment. How much more promising these last five years might have been if they had only remembered a fundamental tenet of the Malaysian way of life:

Kalau ada jarum yang patah
Jangan disimpan di dalam peti
Kalau ada silap dan salah
Jangan disimpan di dalam hati

We are satisfied that FSB would not have got to where it was by 1992 without the efforts of the Ahmad Roose, P.S. Sundram and Dr. Malik, their spouses and their collaborators. It is indeed a pity that the rude denial of their deserving claims for recognition was allowed to degenerate into a battle for control of the company.

It is with regret that we have made orders for costs against the petitioners and Sundram personally. However the adversarial system has its rules and costs must abide the event. It is not right that FSB should be visited with the burden of financing this litigation. The injunction made by YA Dato' Low Hop Bing in the court below on 23 January 1995 must go but there will be no order to inquire into any damages which FSB may have sustained as a result.

In so deciding we hope that the parties will take another look at themselves. They may yet find redemption if only they practise what they so eloquently preached:

> Let us join our hands together
> To bind the colours of our skin
> A rainbow under God's great heaven
> A sign that love will always win.

Reported by Anne Soh